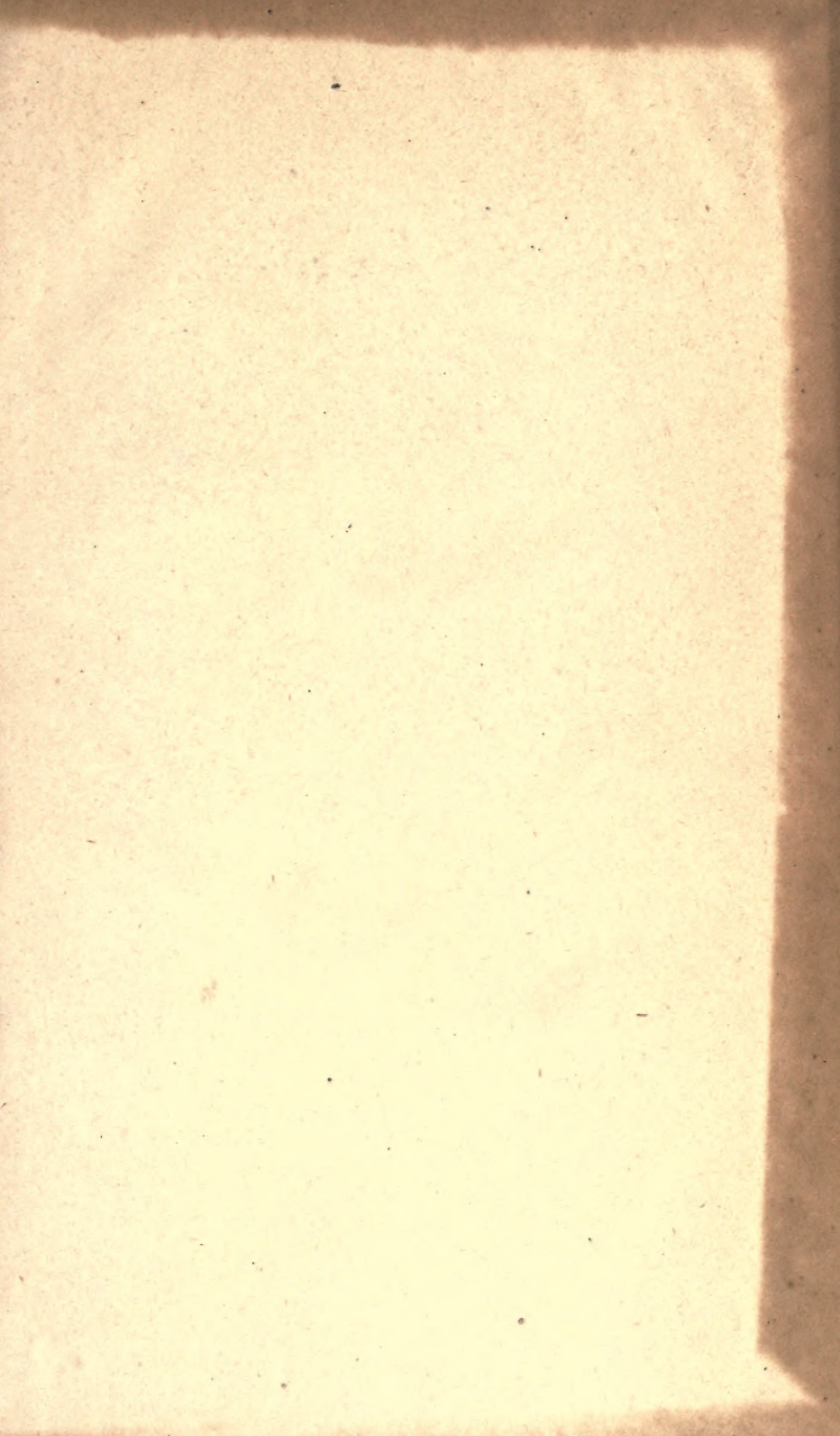


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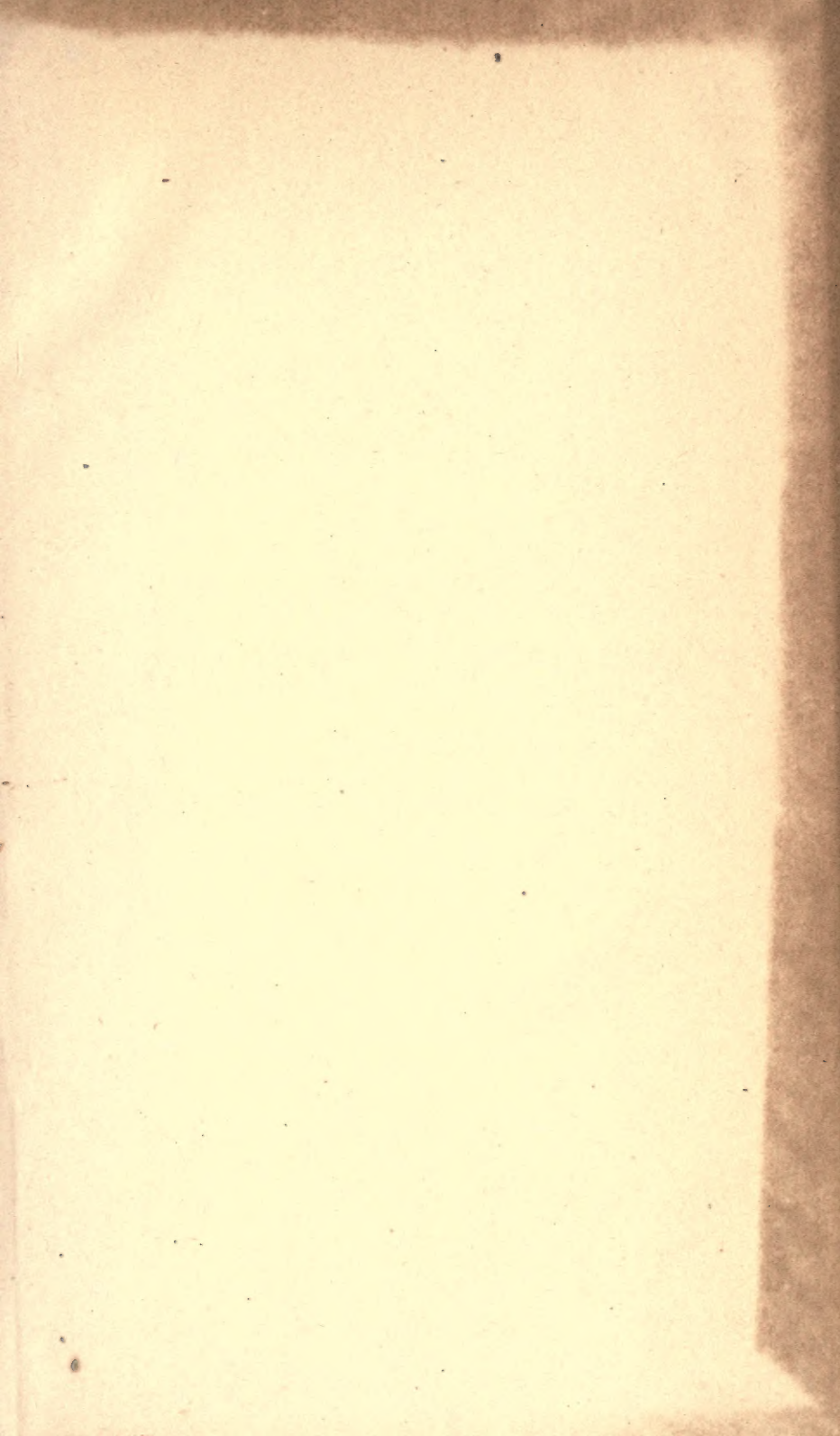
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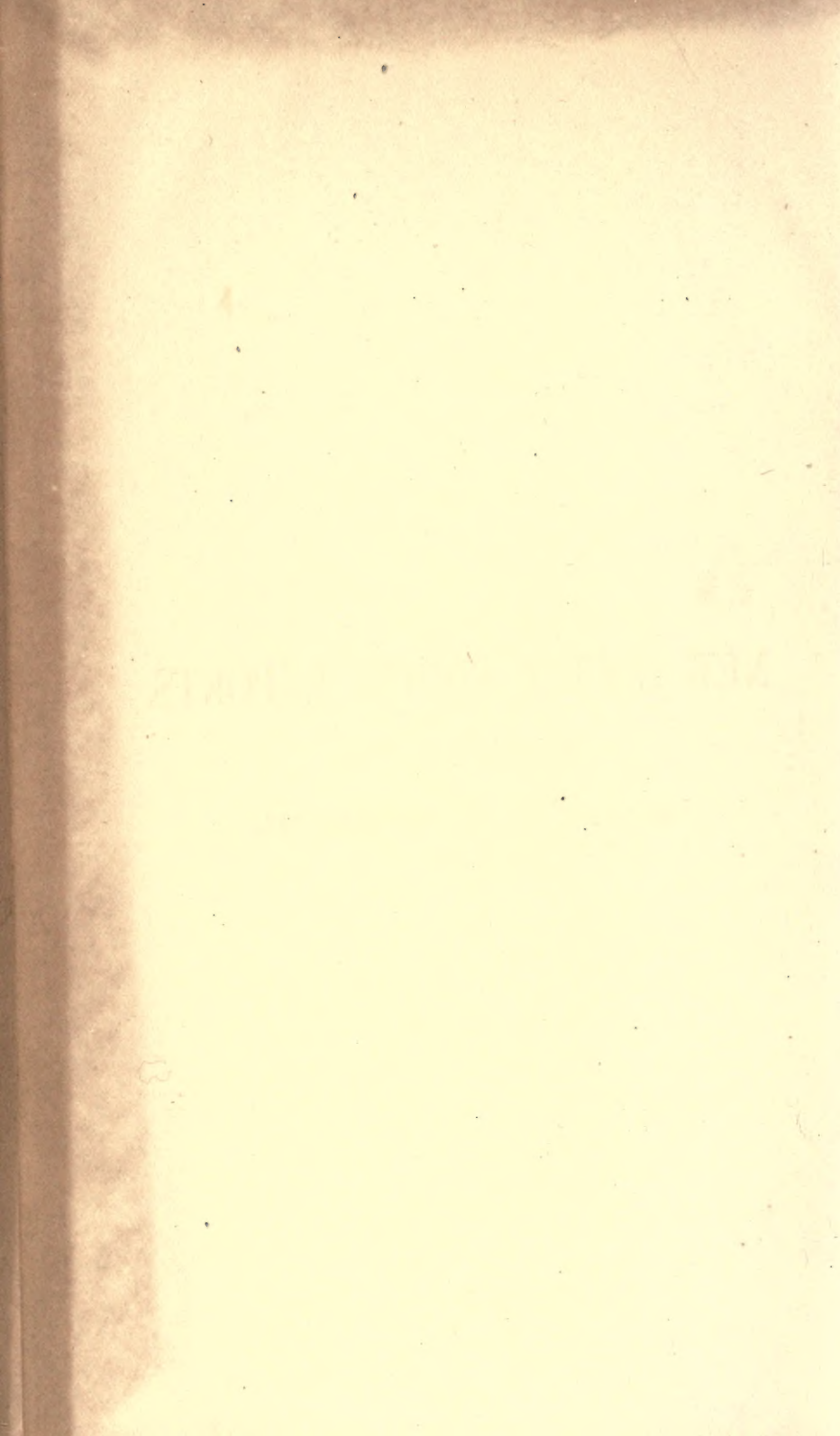


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NEW JERSEY EQUITY REPORTS.

VOLUME VII.

HALSTED, VOLUME III.



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REPORTS OF CASES
DETERMINED IN THE
COURT OF CHANCERY,
AND IN THE
PREROGATIVE COURT,
AND, ON APPEAL, IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY.

~~~~~  
GEORGE B. HALSTED, Reporter.  
~~~~~

VOLUME III.

SECOND EDITION.

WITH REFERENCES SHOWING WHERE THE CASES HAVE BEEN CITED, AFFIRMED, OVERRULED, QUESTIONED, LIMITED, ETC., DOWN TO VOL. XXXIX, N. J. LAW REPORTS (X VROOM), AND VOL. XXVIII, N. J. EQUITY REPORTS (I STEW.), INCLUSIVE.

By John Linn, Esq., of the Hudson Co. Bar.

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 *This Volume continues the decisions in Chancery by the Chancellor appointed under the new Constitution, adopted August 13th, 1844.*

OLIVER SPENCER HALSTED,

CHANCELLOR,

APPOINTED FEBRUARY 5TH, 1845.



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CASES ADJUDGED
IN
THE COURT OF CHANCERY
OF THE
STATE OF NEW JERSEY,

DECEMBER TERM, 1847,

(CONTINUED).

OLIVER S. HALSTED, CHANCELLOR.

BENJAMIN HOYT, Administrator, &c., of ELIZABETH HAIT,
deceased, vs. HERMAN THORN.

W. J., of the city of New York, died there, leaving a will, by which, after certain specific legacies and devises, he gave the residue of his property to W. J. T., when he should arrive at the age of twenty-one. The will was proved in New York, and the estate administered there. W. J. T. died before attaining twenty-one, and without issue. The bill claimed, that by the death of W. J. T. the devise and bequest of the said residue to him lapsed, and that the said residue was distributable among the next of kin of the testator.

E. H., who lived and died in New Jersey, was one of the next of kin. H. T., a citizen of New York, visited E. H., in her lifetime, at her residence in New Jersey, and obtained from her an assignment and release to him of all her interest in the said residue. The bill alleged that this assignment was obtained by fraud, and prayed that it might be declared void, and that H. T. might be decreed to account and to pay, &c. On the filing of the bill by the personal representative of the said E. H., a subpoena was issued against H. T., and was returned "not found," with the usual affidavit of non-residence, and that H. T. resided in New York; and an order of publication was made in the usual form, and was duly published, and a copy thereof was served on H. T., in New York.

Held, that the Court did not thereby acquire jurisdiction of the case.

Benjamin Hoyt, of the township of Union, in the county of Essex, in this State, administrator *pendente lite* of the goods, chattels and credits of Elizabeth Hait, late of the same place, deceased, exhibited his bill, stating that William Jauncey, deceased, late of the city and State of New York, died, in the city of New York, on or about September 19th, 1828, leaving a will, by which he bequeathed all his estate, real and personal, both in New York and in Great Britain, to Sir Edmund Antrobus, of London, John White, captain in the British navy, Thomas Barclay, of New York, and John Rutherford, of New Jersey, in trust, &c., and after devising and bequeathing portions of his real and personal estate, gave and bequeathed all the residue and remainder of his property to William Jauncey Thorn, when he should arrive at the age of twenty-one years, to him and his heirs forever; and appointed the said Antrobus, White, Barclay, and Rutherford, executors of his will; that Antrobus and White declined acting as executors; and that Barclay and Rutherford proved the will in New York, and received letters testamentary as executors thereof; that Barclay died in April, 1830, leaving Rutherford sole surviving executor; that the said William Jauncey Thorn died November 18th, 1830, before attaining twenty-one, and without issue. The bill claims, that by his death before twenty-one, the devise and bequest to him of said residue and remainder lapsed, and that the said residue then belonged to and was distributable among the next of kin of the testator; that the said William Jauncey Thorn was the son of Jane Mary Thorn, named in the will, by her husband, Herman Thorn, now of the city and State of New York; that the said Elizabeth Hait, deceased, was with others named in the bill, the next of kin of the testator; that in February, 1831, after the death of the said William Jauncey Thorn, James A. Hamilton, of the city of New York, counselor at law, obtained from the Surrogate of the county of New York, letters of administration of the goods, chattels and credits of the said William J. Thorn; that Hamilton, as administrator as aforesaid, claimed that the said legacy to William J. Thorn did not lapse by his death, and claimed the right to receive the same from the said Rutherford, executor as aforesaid, and claimed that Herman Thorn was en-

titled to receive the same from him, Hamilton, as administrator as aforesaid; that Herman Thorn, as the father of William J. Thorn, claimed to have and receive from the said executor, Rutherford, the portion of the estate of the testator, William Jauncey, that William J. Thorn would have been entitled to if he had attained twenty-one; that some of the said next of kin of the testator, in July, 1831, filed their bill in the Court of Chancery of the State of New York, against the said Herman Thorn, J. A. Hamilton, John Rutherford, and the said Elizabeth Hait, for an account of the said residue and remainder, and the payment to them of portions thereof, as next of kin as aforesaid; that before any proofs were taken in that cause, a compromise was made between the complainants therein and the said Herman Thorn, one of the defendants therein, whereby the said Herman agreed to pay to the said complainants \$210,000, and in consideration thereof the said complainants released and assigned to him all their interest in the said residue and remainder; that Elizabeth Hait died in Essex county, in this State, March 9th, 1845, leaving an instrument purporting to be her will, and appointing executors thereof, who renounced the executorship; that a caveat was filed against the probate of said instrument as a will; and that, on the 7th June, 1846, administration *pendente lite* was granted to the complainant; that in June, 1833, Elizabeth Hait executed an instrument purporting to be an assignment and release to Herman Thorn of all her interest as one of the next of kin of the said testator, in the personal estate of the said testator; and the bill states that the said instrument was fraudulently obtained, and is void in equity. The bill states the facts and circumstances preceding and attending the execution of the said instrument, and on which it is claimed that the same is void, and states that it was executed by the said Elizabeth at her residence in the county of Essex, in this State; that the said suit in New York was pending at the time of the execution of the said alleged assignment and release; and that the said Elizabeth, as a defendant therein, had appeared to the said suit, by Walter Edwards, her solicitor; and that, at the time of the execution of the said assignment and release, and as a part of the same fraudulent transaction, an instrument of writing

was, by the same and similar means, procured from the said Elizabeth, authorizing the said Herman Thorn to substitute any person he might designate as solicitor for the said Elizabeth in the said suit in New York, in the place of the said Walter Edwards; that Herman Thorn caused George W. Strong, who was the partner of, or in some way connected in business with, the solicitor of the said Herman, to be substituted as solicitor of the said Elizabeth in the said suit; that the said Herman Thorn, having thus obtained control of the said share of the said Elizabeth, and having previously obtained from the complainants in that suit their consent to assign and release their shares to him, an order was made, in the said suit, on motion of the counsel of the said Herman Thorn, the counsel for the complainants therein consenting thereto, and the said Strong, as solicitor for the said Elizabeth, also consenting thereto; by which order it was, among other things, ordered, adjudged and decreed that the said John Rutherford should pay, out of the personal estate of the said testator, \$210,000, the same being, as is stated in the said order, the consideration money of a deed of assignment and release to the said Herman Thorn, of the share of the complainants in that suit in the said residue and remainder of the personal estate of the said William Jauncey; which said deed of assignment and release was then placed as an escrow in the hands of Peter A. Jay—the said \$210,000 to be paid to the said Jay for the use of the persons who had executed the said assignment and release; and that it be referred to a Master, to take and state an account of the estate in the hands of Rutherford, and that the said Rutherford pay the balance in his hands to the said James A. Hamilton, administrator, &c., of the said William J. Thorn, deceased; that, in pursuance of said order, an account was taken, &c., and that Rutherford, after deducting, &c., delivered over the residue and remainder of the said personal estate, amounting to upwards of \$400,000, to the said James A. Hamilton, and delivered over to him all the share of the said Elizabeth Hait of the said residue to which she was entitled; and that, shortly afterwards, he (Hamilton) delivered over the same to the said Herman Thorn; and that said Herman still holds the said Elizabeth's share of the said residue.

The bill prays, that the said alleged assignment and release may be ordered to be delivered up to be cancelled, and that Herman Thorn may be ordered to account with the complainant, and to pay over to him such part of the residue and remainder of the personal estate of the said William Jauncey, deceased, as has at any time come to the hands of the said Herman Thorn, and to which the said Elizabeth was entitled in her lifetime.

Herman Thorn lived in the city of New York when the said assignment and release was procured, and still lives there.

On the filing of the bill a subpoena was issued, and on its being returned "not found," with the usual affidavit of non-residence, and that Thorn resided in New York, an order of publication was made in the usual form; and a copy of this order, or some other notice of the filing of the bill, was served on Thorn, in the State of New York. The matter being stirred before the Court, it was agreed by the counsel for the complainant and the counsel for Thorn, that the question, whether the said proceedings could give this court jurisdiction in the case, should be argued on a motion to vacate the order of publication.

W. Pennington and *P. D. Vroom* for the motion. They cited 8 *John. Rep.* 86, 194; 5 *Ib.* 37; 5 *Mason's Rep.* 35, 42; 1 *Dallas*, 261; 1 *Smith's Ch. Pr.* 152, 3; 4 *Wash. C. C. Rep.* 203; *Elm. Dig.* 60; 6 *Cranch.* 143, 160; 2 *Paige* 404; *Story's Conflict of Laws* 546; *Hopk. Ch.* 213.

W. Halsted and *George Wood*, contra. They cited 6 *Harr. & John.* 201; 1 *Hill* 130, 139; 15 *John. Rep.* 121; 19 *Ib.* 39; 21 *Wend.* 40; *Elm. Dig.* 434, 443; 3 *Harrington's Rep.* 525; 4 *Con. Rep.* 380; 1 *Pet. Rep.* 73, 82, 3; 2 *Chitty's Gen. Pr.* 304, 5; *Ld. Kaime's Law Tracts* 215; 1 *Ves.* 447, 454; 4 *Cow.* 717; *Marvin's Law of Nations* 80, 102; 6 *Cranch.* 159; *Gilb. For. Rom.* 21; *Em. Dig.* 139; 4 *John. Ch.* 106; *Story's Conf. of Laws*, sec. 549; 9 *East.* 192, 4; 6 *Ib.* 582; 7 *Ib.* 68; 4 *Ib.* 164; 7 *Sergt. & Rawle.* 579; 2 *Bos. & Pul.* 381; 8 *Amer. Jur.* 69; 21 *Wend.* 509; 3 *Con. Rep.* 1; 1 *Hill* 482; 6 *Mass.* 358; *Duponceanu* 23, 26, 27; *Story's Confl.*, sec. 516, 519, 550, 540, 542, 536, 585; *Vattel*, Book 2, ch. 7, sec. 54, 5;

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14 *John. Rep.* 134; 16 *Ib.* 327; *Elm. Dig.* 560; 5 *John. Rep.* 41; *Holt's Rep.* 12; 2 *Campb. Rep.* 63; 1 *Gallison* 585; 2 *Story's Eq. Jur.*, sec. 743, 4.

THE CHANCELLOR. I have not been able to take any view of this question which will authorize this court to proceed in this cause. Our statute directing publication in the case of an absent defendant can only apply to cases in which the court has jurisdiction of the subject matter of the suit. If it be not thus limited, there is no limit, either as to the persons of defendants or as to subject matter. Herman Thorn, a citizen of New York, by means of an assignment by Elizabeth Hait to him, received in New York the share to which she was entitled of the personal estate of William Jauncey, deceased, who lived and died in New York, whose will was proved there, and whose estate was administered there. If he has received it wrongfully, or in such manner and by such means that he will be held to have received it for her use, and to be accountable to her for it, her claim is against him personally. *Equitas agit in personam*: the primary decree in all suits in equity is *in personam*. The end and object of any suit instituted by her against him would be the recovery of the money from him. The assignment by means of which Thorn received the money was executed in this State; and it is contended that, inasmuch as the prayer of the bill is, that the assignment may be set aside, as well as that Thorn may account and pay the money; and as the charge in the bill is, that the assignment was procured by fraud, the subject matter of the suit is here. It is admitted that it was necessary to go, in this bill, for an account and payment of the money, as well as for the setting aside of the assignment; that the suit must be wholly here, or wholly in New York. But it is contended that the fraudulent procurement of the assignment is the subject matter of the suit, the gravamen, and will draw the matter of account and payment to it as incidents. I cannot see the matter in this light. If Elizabeth Hait had been on a visit to Connecticut, and the assignment had been procured from her there, would a Connecticut court have jurisdiction without the service of process? Thorn has received the money. Of what utility

could it be for this court to declare the assignment void? He is in New York, with the money in his pocket. The complainant would be obliged to prosecute him there for the money. If he had not received it, would a suit here to set aside the assignment prevent his receiving it? The case amounts only to this: Thorn has received the money by means of the assignment; if the assignment was fraudulently procured, he has received the money wrongfully, and will be held to have received it for her use; and her claim against him is *in personam*. It cannot be that the place where the assignment was executed can give locality to the claim for the money. Does Thorn's coming into this State and procuring the assignment, make the case in any way different from what it would have been if he had by letters induced her to send it to him in New York? He having received the money, the cause of action or object of suit is the recovery of it from him. The cause of action or subject matter of the suit cannot be the mere negation of the validity of the authority by which he received it. Where would be the jurisdiction on assumpsit at law? It is said that fraud in the procuring the assignment gives jurisdiction to this court, because the fraud was practiced here; the fraud not being in the mere execution of the instrument. But what was this assignment other than a personal contract by which Thorn was authorized to receive her money, transitory in its character; a contract authorizing a citizen of New York to receive, in New York, money that she was entitled to there. It seems to me it would be going very far to say that such a contract is a *reslocata* in such a sense that to act upon it would be proceeding *in rem*. Where would the principle contended for in opposition to the motion stop? A citizen of New York, indebted to me, a resident of this State, comes here, and by fraud gets my receipt for the debt. Could a suit be instituted against him in this court, without service of process on him, for the money? Certainly not. Would the putting in the bill a prayer to set aside the receipt remove the difficulty? I think not. The fact that a notice of the suit has been served on Thorn in New York cannot aid the complainants. If that was sufficient, any citizen in New York, having a claim *in personam* against another citizen

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of New York, could give this court jurisdiction of it.

The order of publication will be vacated.

Order accordingly.

JOSEPH B. HOWELL and others, vs. CHARLES ROBB.

If the bill state, either directly or by inference, a base line of a fishery, an answer denying that such is the base line, and stating another, and shewing by what authority that was fixed, is responsive.

W. H. was seized of land bordering on the Delaware river, and held and enjoyed a fishery in the said river opposite his said lands as appurtenant thereto. After his death, intestate, the Orphans' Court of the county in which the lands are situated appointed Commissioners to make partition of his real estate among his heirs at law. The Commissioners, in making partition, separated the lands lying contiguous to the river from the fishery, by lines and fixed monuments, and severed and set off the fishery as a separate share of the estate, the line of separation being the usual high water mark. An injunction, which had been granted restraining the owner of the land from building a wall on the said line, was dissolved.

Motion to dissolve injunction, which had been granted on the bill by one of the injunction Masters.

T. W. Mulford and *W. L. Dayton* in support of the motion.

Mr. Jeffers contra.

On filing the answer, notice was given of a motion to dissolve the injunction. Afterwards, affidavits were taken on the part of the complainants, which *Mr. Jeffers* offered to read in support of the injunction.

Mr. Dayton opposed the reading of them; and cited *Eden. on Inj.* 117; 1 *John. Ch.* 445; 2 *Ib.* 204.

THE CHANCELLOR said they could not be read.

The facts in this case will sufficiently appear in the opinion delivered by the court.

THE CHANCELLOR. The bill states, that the complainants are seized of three-fifths of the Hugg fishery, and that the defendant is seized of two-fifths thereof; and that the parties in interest appointed Philip Gray, John R. Cowperthwaite and Isaac Reeves, referees, to set off the share of the defendant by marks and measurements. That the referees made partition, setting off by metes and bounds two-fifths of the said fishery to the defendant and three-fifths

thereof to the complainants; the part allotted to the defendant beginning at what the surveyors of the parties called "the upper stone," above Syke's wharf, and running south, along the base line of said fishery, 229 feet, to the lower edge of said Syke's wharf, to a stake driven into a decayed log of said wharf; thence down the river, along said base line, 547 feet to a large "pebble stone" in or about the line of the usual high water mark; and allotted to the complainants the remaining river front, or fishing right of said fishery, beginning at the south side of the said "pebble stone," and running down the river along the base line of said fishery.

That the defendant has converted his part of the shore of the said fishery into town lots fronting on the river, and has erected a stone wall along the shore, below high water mark, in front of the fishery, and below the large "pebble stone," (*i. e.* down stream from the large "pebble stone,") in front of the fishery allotted to the complainants, and threatens to continue it.

That said wall, if continued, will destroy the complainants' fishery; that the tide will wash up against said wall, and it will be impossible to make a high water haul in said fishery, which is the most important haul.

The bill prayed an injunction against further erecting the wall, and it was granted.

The answer states, that the complainants hold their right in the said Hugg fishery under Wm. Hugg, the elder, and that the defendant holds his land or town lots under the same Wm. Hugg. That said Wm. Hugg died intestate, seized of the said land or town lots, and held, used and enjoyed the said fishery as appurtenant thereto. That after his death the Orphans' Court of Gloucester appointed Michael C. Fisher, Wm. Sharp and Aaron Wood to make partition of his real estate among his heirs at law. That the said commissioners made such partition, and thereby caused the lands lying contiguous to the river to be separated from the said Hugg fishery, by lines, fixed monuments and permanent land marks, and did not bound said lands by the river, or any part thereof; which lines so fixed by the said commissioners now form the westerly boundary of the land or town lots of the defendant; within which the said stone wall has been erected. That the said commis-

sioners, in making the said partition, severed the said fishery, and set off the same as a distinct and separate share of the estate of said Wm. Hugg; that the westerly lines and boundaries of his land remain the same as when fixed by the said commissioners.

That Gray, Cowperthwaite and Reeves were not appointed for the purpose of fixing the easterly line of said Hugg fishery, and did not fix the same in their partition; but that they were appointed solely to set off two-fifths of the length of said fishery to the defendant, and three-fifths of the length to the complainants; and that for that purpose, and no other, they caused the large "pebble stone," mentioned in the bill, to be placed at a certain point on the shore, in about the line of the usual high water mark.

That he, the defendant, is seized of a large tract of land lying adjacent to the shore of the Delaware river, and in front of the said Hugg fishery, of the value, as he believes, of \$100,000, and daily increasing in value by reason of the great improvements now being made upon and near the same. That the current of the river sets strongly against the shore where his said land binds on the river, and that a wall is necessary to prevent its being washed away. That within a few years the water has made such encroachments upon his land that large trees that were marked as monuments to show his boundary line, and also large trees standing and growing within the line of and on his land, have been washed up and thrown down by the action of the current. That the wall, although erected along the shore, at about high water mark, is not, nor is any part of it, upon the said fishery; but that the same and every part of it is on his land and within the lines bounding the same. He admits he has erected a stone wall of about 100 yards in length, and about 3 or 4 feet high, and that it was his intention to continue such wall along the whole river front of his land; but he says the wall is placed at about the usual or average high water mark; that though sometimes the tide rises up to and washes it, at other times the tide at high water does not reach it; and that he is informed and believes that it will not prevent the complainants from making their high water haul at any usual or ordinary high tide.

The bill goes upon the base line of the fishery, without stating distinctly what that is. It might be inferred from the bill that the commissioners to divide the fishery between the defendant and the complainants fixed the base line of the fishery, and that the wall erected by the defendant is outside of that line; or the bill may mean that high water mark is the base line of the fishery, and that the wall erected is below high water mark. No reference is made in the bill to the partition made by the commissioners appointed by the Orphans' Court of Gloucester to divide the real estate of Wm. Hugg, the elder, deceased; which commissioners separated the fishery from the upland along the shore, by separate boundaries. The answer sets out that partition, and states that the wall erected is inside, *i. e.* on the land side of the line fixed by it, separating the fishery from the upland. And there is nothing in the bill inconsistent with this idea.

The commissioners appointed by the Orphans' Court and who divided the fishery from the upland, and allotted the fishery as a separate part of the estate of Wm. Hugg, the elder, were the proper persons to fix the line between the fishery and the upland; and the persons to whom the fishery fell, in that division, took it according to that line. Those commissioners, it would seem, fixed the line at about the usual high water mark; and from the statements of the bill and answer there is nothing to show that the wall erected by the defendant is outside, *i. e.*, on the river side of that line. The bill says it is below high water mark. What high water mark is meant? The usual high water mark, or the line to which the water sometimes rises?

The commissioners to divide the fishery from the upland, no doubt, fixed what they understood to be the ordinary high water mark, or a line which would give the fishery its proper rights. And the answer says the wall is within the line fixed by them.

It was objected on the argument, that that part of the answer which sets out the partition made by the commissioners to divide the real estate of Wm. Hugg, the elder, and which separated the upland from the fishery, was new matter, not responsive to the bill. It does not so appear to me. The bill stating, either directly or by in-

ference, a base line of the fishery, it seems to me that the answer, denying that such is the base line, and stating another, and showing by what authority that was fixed, is clearly responsive.

On the facts stated in the answer, the injunction will be dissolved.

Order accordingly.

DAVID HALLIDAY vs. PETER A. JOHNSON and others.

A decree in a mortgage case was appealed from; and pending the appeal, and within a year from the date of the decree, an agreement, under seal, was made between the parties, that a certain portion of the amount due on the decree should be paid on the execution of the agreement; that the interest on the balance should be paid half yearly, and that instalments of principal should be paid yearly; and that on failure in paying any instalment, the complainant should be at liberty to issue execution on his decree. Held, that on failure of payment of an instalment, an execution might issue after a year without *scire facias*.

In June, 1842, Peter A. Johnson filed his bill for foreclosure, on a mortgage dated April 1, 1841, given by Edwin Ford and wife to him, to secure the payment of \$6,000, in four years from date, with interest half yearly, from Feb. 1, 1841, according to the condition of a bond, &c. On the 17th April, 1843, a Master reported that there was then due on the mortgage \$910.53, and that there would become due on the 1st of April, 1845, \$6,000, and the interest thereon from Feb. 1, 1843, being \$778 19; that a sufficient part of the mortgaged premises to pay the amount due at the date of the report could not be sold, and that the whole of the mortgaged premises should be sold to pay the amount then due and the amount to become due. On the 28th July, 1843, a decree was made for the sale of the whole premises, to pay the amount then due and the amount to become due. Ford appealed from this decree; and, in consequence of the appeal, no execution was issued. On the 1st May, 1843, a half year's interest became due. In Nov. 1843, Johnson brought ejectment on his mortgage. On the 1st Feb. 1844, another half year's interest became due.

In this state of things, an agreement of three parts was made, by writing under seal, dated May 20, 1844, between Ford, of the first part, and George D. Strong, of the second part, and Johnson, of the third part, by which, after reciting the said mortgage, and the proceedings thereon, and the appeal, and the ejectment suit, and that Ford was about to sell the premises to Strong, Ford agrees with Johnson to withdraw his appeal. and

to permit judgment to be entered in the ejectment. Strong agrees with Johnson to pay him, on the execution of the agreement, \$6,000, and to pay him the further sum of \$482.28, on or before May 31st, 1844, with interest from the date of the agreement, and all costs, and to pay Johnson the interest on the \$6,000, half yearly, on the first days of Aug. and Feb. in each year, and \$500 of the principal on the 1st of April, 1845, and \$500 of the principal on the 1st of April, in each succeeding year, until the 1st of April, 1848, when the balance of the said principal was to become payable from Strong to Johnson. That Strong should put the mill, machinery and premises in good repair, and keep them so until the mortgage should be paid off, and that all the machinery he should put upon the premises should be subject to the mortgage; that he would keep the mill and machinery insured for at least \$5,000, and assign the policy to Johnson. That after Ford's said appeal should be withdrawn, the decree in Chancery should remain and be of the same force as if the appeal had not been taken, and should stand to secure the performance of the covenants contained in the said agreement; and that if Strong should fail to make the payments of interest or principal for thirty days after the same should become payable according to the said agreement, or fail in any other thing in said agreement contained to be performed by him, then Johnson should have full right to issue execution on the said decree and sell the mortgaged premises according to law; and that in case of any breach of said agreement on the part of Strong the whole of the principal money should become payable on the 1st of April, 1845, according to the condition of the said mortgage. Johnson agreed to delay all proceedings on the decree until April 1st, 1848, except upon the breach of said agreement by Ford or Strong, and to extend the time of payment of the mortgage (except as before stated) for three years from the time when it becomes payable by the terms of it, i. e. to April 1st, 1848; and that he would take no measures to enforce the decree, nor issue execution on the judgment in ejectment, unless it be by reason of the breach or non-performance of the said agreement.

On the 22d May, 1844, Ford and his wife conveyed the property to Strong, subject to Johnson's mortgage;

and on the next day Strong and his wife executed a mortgage on the premises to Ford, to secure \$3,800, part of the purchase money.

On the 22d May, 1844, Strong paid every sum required by the said agreement to be paid, leaving only the \$6,000 unpaid and interest thereon from Feb. 1st, 1844.

Strong went into possession, and put the mill, machinery and premises in good repair; and the bill states that he put in the mill valuable machinery and otherwise improved the premises to the value of \$7,000 or \$8,000; and the interest was paid to Johnson up to Aug. 1, 1846.

On the 15th June, 1846, Strong and his wife, for \$4,500, conveyed an undivided half of the premises to David Halliday, the complainant; and on the 31st Oct. 1846, for \$5,000, conveyed the other half to the said complainant.

On the 23d Aug. 1846, Johnson caused an execution to be issued on the decree, and delivered to the Sheriff, commanding him to make, by sale of the mortgaged premises, \$910.53, with interest thereon, and \$6,000 with interest thereon.

The execution was issued without scire facias and without notice.

Halliday thereupon filed his bill, stating the foregoing facts, and other matters from which he supposed an equity might arise in his favor to have the sale stayed on his paying what by the terms of the agreement would then be due, throwing out of consideration that part of it which stipulates that on the failure to pay any instalment therein mentioned Johnson should be at liberty to proceed on the decree; and prayed an injunction staying the sale; which was granted.

An answer was put in by Johnson; and a motion thereupon made to dissolve the injunction.

M. Little and *A. Whitehead*, in support of the motion. They cited 1 *Green's Ch.* 444; 2 *Archb. Pr.* 87; 2 *Tidd's Pr.* 1005, 1021, 3; 1 *Seller's Pr.* 189, 515; 2 *Burr.* 664; 19 *John. Rep.* 173; 11 *Ib.* 513; 8 *Ib.* 361; 2 *A. K. Marsh.* 512, 573; 2 *John. Ch.* 51, 526.

C. E. Scofield and *W. Pennington*, contra.

THE CHANCELLOR. The allegations of the bill from which it was supposed an equity might arise in favor of the complainant to have the sale stayed on his paying what would be due by the terms of the agreement, independent of that part of it which stipulates that on failure to pay any instalment of principal therein mentioned Johnson should be at liberty to proceed on the decree, are, I think, sufficiently denied by the answer.

The other question is, whether, under the circumstances, it was regular to issue an execution without a *scire facias*. The question is the same in this case, it strikes me, as if the agreement was between Johnson and Ford alone. The decree was obtained in July, 1843. The agreement was made in May, 1844. It provides that a certain portion of the amount due on the decree should be paid on the execution of the agreement; that the interest on the balance should be paid half yearly; that instalments of \$500 each should be paid on the 1st of April after the date of the agreement, and on the 1st of April in each succeeding year, till April 1, 1848, when the whole balance should be paid; and that on failure in paying any instalment Johnson should be at liberty to issue execution on his decree. I am of opinion, that under such an agreement for a stay of execution an execution may issue after a year, on a failure to comply with the conditions on which such stay is granted, without a *scire facias*. The fact that something has been paid on the decree (several half yearly payments of interest have been made according to the requirement of the agreement) does not render it necessary to issue a *scire facias*. The case is the same in this respect as if a part of the sum decreed should be paid within year, and an execution should be issued within the year without a *scire facias*. That Johnson did not issue execution on the first default in paying a yearly instalment of principal, but waited till after default in paying the second instalment, did not defeat his right to issue execution after the second default. The injunction will be dissolved, and the complainant in the decree be permitted to proceed on his execution, endorsing thereon the amount remaining due.

Order accordingly.

SOLOMAN NEWMAN vs. ABRAHAM NEWMAN.

The oath of a Jew complainant to an injunction bill must be made according to the form and solemnities of the Jewish religion.

An injunction has been obtained by the complainant on a bill sworn to in the usual form.

O. S. Halsted, Jun'r, on affidavits showing that the complainant was a Jew by birth and religion, and attended the Jewish Synagogue, moved that the injunction be dissolved.

Mr. Bradley, contra.

The Chancellor ordered that the complainant swear to the bill according to the form and solemnities of the Jewish religion, in ten days after service of a copy of the order, or that the injunction be dissolved.

The complainant failed to comply with the order.

Injunction dissolved.

See 1 *Vernon* 263, case 258.

CASES IN CHANCERY.

MARCH TERM, 1847.

PERRINE S. VAN WAGNER v. EDWIN VAN WAGNER.

A. executed a deed of land to B., absolute on its face; and B. executed to A. a bond, in a penal sum, reciting the deed made by A. to him, and that A. was indebted to him on two notes, stating them, and the amounts thereof, and providing that if A. should refuse or neglect to pay the said notes on or before a certain day, the bond should be void; but that if A. should, on or before the said day, pay the said notes, and the said B. should, upon due notice of such payment, thereafter neglect or refuse to convey the said land to A., the said bond should remain in force.

Held, that the deed and bond constituted a mortgage.

Held, further, that the mortgage was not a security for moneys due from A. to B. on other accounts.

On the 26th of April, 1845, Perrine L. Van Wagner exhibited his bill, stating that his father, James Van Wagner, died June 1, 1842, intestate, leaving his widow, Phebe Van Wagner, and four children, viz: the complainant, Edwin Van Wagner, the defendant, and Eliza Sayre, wife of Charles Sayre, and Phebe Jane Van Wagner, his heirs at law; that the said decedent died seized of considerable real estate; that after his death, and on or about July 21, 1842, the said widow and the said Edwin, Phebe Jane, and Charles Sayre and wife, by their deed of that date, for the consideration of \$4,000 expressed therein, bargained, sold, released and conveyed to the complainant, in fee simple, all their interest in the said real estate.

That, in order to secure to the said widow an annuity during her life, in consideration of her joining in said deed, the complainant, on or about the date of said deed, executed to her his bond in the penal sum of \$2,800, condition for the payment to her of \$84 a year during her life; the first payment to be made on the 1st of April, 1844; and, further to secure the payment thereof, the complainant, with his wife, executed to the said widow, a mortgage on the lands described in the said deed, except a part of the first tract mentioned therein.

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1842, in the penal sum of \$2,100, conditioned for the payment to them of \$1,050 on the terms expressed in the said condition, which are, according to his recollection and belief, for the payment, at the death of the said widow, of \$350 to the said Edwin, \$350 to the said Phebe Jane, and \$350 to the said Charles Sayre and wife. And, to secure the payment of the moneys in the last mentioned bond specified, the complainant and his wife, on the same 21st of July, 1842, executed to the said Edwin, Phebe Jane, and Charles Sayre and wife another mortgage on the same lands and premises, excepting a part of the first tract.

That the share of the said children and heirs at law in the lands and real estate of the said decedent, at the time of the said conveyance thereof to the complainant, was valued at \$700 over and above the said sum of \$1,050 for which a mortgage was given as aforesaid to the said Edwin Phebe, and Charles Sayre and wife.

That the complainant, with his wife, immediately after receiving a title to the said lands, and on the said 21st of July, 1842, conveyed, in fee simple, with the usual covenants of warranty, a part of the said first tract, being about eighteen acres, to the said Edwin, for the consideration expressed in the said deed of \$800; and the said deed and the land described therein were intended, accepted and taken by Edwin, among other things, in full satisfaction of the said sum of \$700, the valuation to him as aforesaid in the said lands and real estate.

That on or about July 25, 1842, the complainant gave his promissory note to the said Charles Sayre for \$700, payable to him or his order, eight months after date, for value received, without defalcation or discount, and which note was also subscribed by said Edwin Van Wagner, as security for the complainant, and was delivered to and accepted by the said Charles Sayre for and in satisfaction of his and his wife's joining in the said conveyance to the complainant, and for the said valuation to them of \$700.

That, in order to secure to the said Edwin, Phebe Jane, and Charles Sayre and his wife \$1,050, as an equivalent for their interest in the dower right of the said widow at her death, the complainant gave to them his bond, dated the same July 21;

and that in or about July, 1842, the complainant gave to the said Edwin his promissory note for \$300; which said two promissory notes last mentioned are, the notes mentioned and referred to in the recital and condition of the bond hereinafter mentioned as given by the said Edwin to the complainant.

That upon the urgent solicitation, request and demand of the said Edwin, and to secure him in respect to his being surety as aforesaid on the complainant's said note for \$700 to Charles Sayre, and to secure him in respect to the said note of \$300 so given to him, the complainant and his wife, on or about Sept. 20, 1843, executed a deed in fee simple, absolute on the face of it, and delivered it to the said Edwin, for all the lands in the said first mentioned deed described, except the eighteen acres conveyed to the said Edwin as aforesaid; which deed though absolute on the face of it, the complainant charges, was given and accepted and intended so to be by the parties to it, as and in the nature of a mortgage.

That, at the time of the giving the same to the said Edwin, the said Edwin made, executed and delivered to the complainant a bond, in the penal sum of \$1,000, dated Sept. 20, 1843, reciting that the complainant has, by deed of that date, conveyed to the said Edwin certain lands in Morris county, being the same premises mentioned in a deed from the heirs of James Van Wagner, except a tract previously conveyed by the complainant to the said Edwin, deceased, to the complainant; and that the said Perrine (the complainant) is indebted to the said Edwin on two promissory notes, on the first of which the said Edwin is security for the said Perrine to Charles Sayre, for \$700, with interest from April 1, 1843; and the second of which is drawn by the said Perrine to the said Edwin, dated in 1843, for \$300, and has been indorsed and guaranteed away by said Edwin; that said Edwin is about to pay to the said Charles Sayre \$420 on the said \$700 note; and then providing, that if the said Perrine shall refuse or neglect to pay to the said Edwin \$432, or shall refuse or neglect to pay to the person entitled to the balance which will then be due on the said note for \$700, or the sum of \$200 on the said note for \$300, on or before the 22d of March then next, then the said bond to be void and of no

effect. But that if the said Perrine shall, on or before the said 22d of March, make the said several payments, and the said Edwin shall, upon due notice of such fact, thereafter neglect or refuse to convey to the said Perrine the premises, &c., by deed of that date conveyed by the said Perrine to the said Edwin, as fully as the same were by that deed conveyed to the said Edwin, then the above obligation to remain in full force.

That, shortly after the said conveyance of the said lands to the complainant he took the direction and control thereof, except the said eighteen acres; and in the latter part of March, 1844, moved from the township of Bernards, with his family, and took possession thereof; that as the said 22d of March was approaching it was agreed between the said Edwin and the complainant to extend the time for making the said several payments mentioned in the condition of the last mentioned bond until the 1st of April, 1845. And the complainant, as connected with this arrangement, consented that the said Edwin might live and board with the complainant upon the complainant's moving upon the said premises; that on his moving upon the said premises the said Edwin began to live and board with the complainant, and has continued to do so to this time.

The bill charges, that the arrangement between him and Edwin was, that the board of Edwin was to be instead of interest on the two said notes; that Edwin, in September or October, 1844, declared to the complainant that he should not have the said lands at all; and, about that time, ordered the complainant's hired man to stop hauling out compost and spreading it on the land, alleging that the complainant had already more sown on the premises than he would reap; that Edwin has otherwise, for some time past, assumed to be the absolute owner of the said premises discharged of any right or interest of the complainant's therein, and has denied the complainant's right to redeem the same by paying off the said notes, or in any other way; and that, about two months ago, as the complainant is informed and believes, the said Edwin offered the said lands, or the principal part thereof, for sale, to one Ebenezer C. Lindsley, who wished to purchase the same, without informing the said Ebenezer of the right and equitable interest of the complainant

therein. And that the said Edwin has lately offered some part of the said lands for sale to one William Cross.

The complainant states, that the said lands so conveyed by him and his wife to the said Edwin, were, at the time of the said conveyance, worth to him at least \$4,200, and that, with the full expectation and intention of redeeming the same, he expended large sums in improving the same, which was done with the knowledge and under the observation of the said Edwin, who then suffered the same to be done without insisting that under his said deed he had an absolute title to the said premises indefeasible, or in any way warning the complainant against making such outlay and expenses; that between April 1 and July 1, 1844, the complainant, with the knowledge of the said Edwin, put about 150 bushels of lime and about 50 bushels of ashes upon the said premises, and put about 1,500 shingles on the barn, and 1,100 or 1,200 ft. of oak weatherboards on the barn and shed adjoining, and moved a corn crib and smoke house on the premises, cut and made 150 chestnut rails and put them in fences on the lands, and made thereon about 150 chestnut posts, intended for use on the same; all which was done under the full expectation and intention on the part of the complainant of redeeming and receiving back to himself the title to the said premises.

That the said Edwin, on or about Sept. 22, 1843, paid on the said note of \$700 the sum of \$420, and that the complainant afterwards, on or about April 2, 1844, put into the hands of said Edwin \$285 to pay, for the complainant, on the said last mentioned note, which he did, on the same day, pay on the said note. And the complainant afterwards paid the balance of the said note to the holder of it, and took it up and has it now in his possession.

That the complainant is informed and believes that the said Edwin has paid off and taken up the said note of \$300, \$100 whereof was part of the consideration of \$800 expressed in the first mentioned deed from the complainant and his wife to the said Edwin, so that the complainant, as appears by the said bond of the said Edwin to the complainant, was only to pay \$200 upon the said \$300 note.

That on the 2d of April, 1845, the complainant, by his agent, tendered to the said Edwin \$700, being the full amount of

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what the complainant could legally be required to pay on the said notes of \$700 and \$300, as well for the principal as for the interest thereof; and upon such tender required said Edwin to re-convey to him, in fee simple, by a release and quit-claim deed, free from any incumbrance thereon made by the said Edwin, the said lands and premises described in the said deed from the complainant and his wife to the said Edwin, and presented to the said Edwin a release and quit-claim, to be executed by him to the complainant; but that the said Edwin refused to accept the said tender and to convey the said premises to the complainant, insisting that he had a good title to the said premises which could not be defeated by the complainant, or by any act of, or tender by the complainant.

The bill prays, that the complainant may be permitted to redeem the said lands and premises; the complainant offering to pay the amount due for principal and interest on the said mortgage or deed in the nature of a mortgage, up to the time of such tender made as aforesaid; and that the said Edwin may be decreed to re-convey the said lands to the complainant, in fee simple, free from any incumbrance made by the said Edwin thereupon, except the part excepted as aforesaid; and that in the meantime the said Edwin may be restrained by injunction from conveying or incumbering the said lands or any part thereof.

The injunction prayed for was allowed.

The defendant in his answer denies that the conveyance made by the complainant to him was accepted and intended by the parties thereto to be in the nature of a mortgage, and avers that he received the said deed as an absolute deed for the property, and that the bond or agreement made by him to re-convey to the complainant was an independent agreement, to be performed by him on the conditions therein specified; and that he was ready and willing to re-convey to the complainant at the time specified in the said bond or agreement, according to the terms and conditions thereof, but that the complainant neglected to pay the moneys therein mentioned and take a re-conveyance at the time and according to the terms of the said agreement.

He also sets up that the complainant is indebted to him on

other accounts, and claims, if the complainant shall be permitted to redeem, that he should be ordered to pay, also, the amount which may be found to be due him from the complainant on such other counts.

Testimony was taken on both sides.

J. J. Scofield for complainant. He cited 1 *Green's Ch.* 264; *Saxton's Ch.* 537; *Rev. Stat.* 658, sec. 4; 5 *Mass. Rep.* 109; 12 *Ib.* 387; 2 *Story's Eq.*, sec. 1018, 19; 13 *Pick.* 411, 15; 14 *Ib.* 467; 15 *Ib.* 259; 18 *Ib.* 540, 1 *Wend.* 437; 3 *Ib.* 211, 213; 7 *Ib.* 248; 19 *Ib.* 518; 2 *Mass.* 493, 7; 8 *Ib.* 159; 12 *Ib.* 457; 13 *Ib.* 309; 1 *Sandford's Ch. Rep.* 56; 1 *Paige* 56, and other cases.

E. W. Whelpley, contra, cited 6 *John. Ch.* 423; 4 *Kent's Com.* 175, 6; 2 *Edwards*, 138.

THE CHANCELLOR said that the transaction was a mortgage, and that it was not a security for any balance due the defendant on other accounts.

Decree for complainant.

CITED in *Vanderhaize v. Hugues*, 2 *Beas.* 244

THOMAS MERVINE *vs.* SAMUEL VANLIER et al.

At Sheriff's sale on Execution, *caveat emptor* is the rule.

The Sheriff, at the sale, said he was selling the right and title of the mortgagor, and the crier of the sale advised a friend of his, who asked his advice aside, privately, to have nothing to do with the property; that whoever bought it would probably buy a law suit. The property, for which the complainant had agreed to pay \$2,800, was sold for \$1,400. It had been a neighborhood talk that the title of the mortgagor was disputed, and the complainant had himself contributed to becloud the title. There was no allegation in the bill that the title was free from dispute; nor that any better offer had been made for the property. The Court refused to set aside the sale.

The bill, filed March 20th, 1847, states, that on the 29th of Jan. 1842, Thomas Mervine, the complainant, bought of Thomas Welles, one of the defendants, a farm in the township of Deerfield, in the County of Cumberland, for \$2,800, subject to a mortgage thereon, given by Welles to Daniel Elmer, another of the defendants, dated March 29th, 1841, for \$500, with interest.

That Welles gave a deed to the complainant, with full covenants of warranty and seizin; and that the complainant gave Welles his bond, conditioned for the payment of the said sum of \$2,800, and a mortgage upon the premises to secure the same; and also assigned to Welles, as further security, a certain ground rent in Philadelphia, of the yearly value of \$570, payable half yearly.

That on the 23d of Dec. 1844, Elmer commenced a foreclosure suit upon his mortgage, against Welles and the complainant, That this complainant put in a demurrer to the bill in that suit, which was overruled; and afterwards filed such answer in that case as he was advised was material. That after filing the said answer, he, living in Pennsylvania, lost sight of the proceedings in that suit, relying on his counsel to keep him duly informed thereof; and that he knew nothing of the proceedings that occurred at the sale, until a long time after the sale of the mortgaged premises, in the bill after stated.

That in the said foreclosure suit brought by Elmer, a decree

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was obtained for the sale of the premises to satisfy the several sums found due to Elmer and to Welles, on their respective mortgages; and a *fi. fa.* was issued to the Sheriff of Cumberland, commanding him to make sale of the premises, and to dispose of the proceeds according to the said decree.

That on the 19th of Dec., 1846, the Sheriff sold the premises. But this complainant avers, that he did not sell the same conformably with the terms of the said decree or of the said execution; but that he sold "the right and title of the said defendants (in that suit) to the premises, if any they have," thereby conveying the idea that it was doubtful if the said Thomas Welles and this complainant had any right or title to the same. And that, at the same time, the person who acted as crier of the said sale informed the bidders "that they had best have nothing to do with the property; that they would buy a heavy law suit if they got it"; by reason of which irregular proceeding on the part of the said Sheriff, and of the representations of the said crier of the said sale, the interests of this complainant were greatly prejudiced; insomuch that persons who came to the sale to bid for the property, and were willing to give a fair price for it, declined bidding, and the same was struck off and sold for the very low sum of \$1400, to Samuel Vanlier, the other defendant in this suit.

That there was present at the said sale at least one bidder who was willing to pay for the property, at least \$2500, as this complainant has been informed and verily believes; but was deterred from bidding by the unfair mode of proceeding of the Sheriff, and the unfair representations of the crier.

That after the sale, and before this complainant was made aware of the facts aforesaid, the premises were conveyed by the Sheriff to the said Vanlier; and the proceeds have been appropriated, in the first place, to paying off the amount due Elmer on his said mortgage, and the balance thereof, being \$656.98, has been paid into Court, subject to its order, where it now is.

The bill prays that the said sale may be vacated; and that Vanlier may be decreed to deliver up to be cancelled the deed received by him from the Sheriff; and that the decree on which the sale was made may be opened, in order that the title of this complainant to the property affect-

ed by the said decree may be definitively settled before a sale of the same, that it may not be sacrificed if the title of this complainant be good ; and for such further relief, &c.

Samuel Vanlier put in his several answer. He says he believes \$2800 was a very high price for the farm when the complainant bought it, and more than it was worth, though it was then in better order, and worth more than when it was sold by the Sheriff.

He submits that the complainant, being a party to Elmer's foreclosure suit, and having appeared and answered the bill in that suit, is bound by the decree made therein, and was bound to take notice and inform himself of the time and place of sale ; and that he is informed and believes, and therefore charges that the complainant in this suit was, in fact, informed of the time and place of the sale, and might have attended if he had thought fit to do so.

He says it is not true, to his knowledge, information or belief, that the Sheriff sold "the right and title of the said defendants (in that suit) if any they have ;" nor is it true, to his knowledge, information or belief, that the crier of the said sale informed bidders that "they had best have nothing to do with the property, that they would buy a heavy law suit if they got it," or any words to that effect. On the contrary, at the commencement of the sale, the Sheriff caused the conditions of sale by him signed to be publicly made known ; which conditions were for the sale of land the property of Thomas Welles and Thomas Mervine, taken in execution at the suit of Daniel Elmer, complainant ; and the metes and bounds of the farm are therein fully set forth ; and the property was sold agreeably to said conditions, and a number of bids were made by different persons, until, after it had been cried for half an hour or more, this defendant being the highest bidder, at \$1400, the same was publicly struck off to him ; and, at the request of the Sheriff, he signed the conditions of sale.

That, according to the conditions of sale, the deed was to be delivered and the purchase money paid on the 26th of Dec., the month in which the sale took place, on which day he paid the purchase money, and the Sheriff delivered to him a deed for

the property; and this defendant, shortly after, took possession of the farm, by renting it to Samuel Rickman, who now holds it as his tenant.

He says he has been put to considerable expense, trouble and inconvenience in obtaining the money to pay for said farm, and in attending to the same since, and in making arrangements and repairs as the owner thereof.

That he does not know what any person present at the sale was willing to give for the property. That he has no information that any one made known his willingness to give more than he, this defendant, bid. That he is informed, and believes it to be true, that some persons were unwilling to bid for the property in consequence of the repeated declarations of the complainant in this case that Thomas Welles never had title to it, and in consequence of the well known character of the complainant for litigation. That he is informed that the answer of the complainant in this case to the bill of the said Daniel Elmer in his said foreclosure suit sets forth that Welles had not a good title to the said farm; and is also informed, that the complainant in this case recently instituted proceedings in some court in Philadelphia, against Welles, to obtain redress from him for an alleged failure in the title, or for fraud in the sale of the said farm by Welles to him.

That the complainant repeatedly declared that he did not intend to pay the Elmer mortgage, but would let Elmer sell the property.

He, therefore, submits that, though it is probably true that the said farm would have sold for something more than he gave for it if sold on a credit, and if not subject to doubts and difficulties, as it was, in regard to the title, under the circumstances he gave a full price; and that, at all events, the complainant, who has himself done so much to question the title of the property and reduce the price of it, has no just cause to complain of a result produced by his own acts.

That he is informed and believes, that Thomas Welles resides out of this State; and that Daniel Elmer is too unwell to answer the bill, and is not likely to be well enough to do so at any time hereafter.

Testimony was taken on both sides.

It was admitted by the counsel of the respective parties, that since the sale of the mortgaged premises to Vanlier, and the payment into Court of the surplus, Welles has been paid the money due to him, and has now no interest in the matter.

W. L. Dayton for the complainant.

L. Q. C. Elmer contra.

THE CHANCELLOR. At Sheriff's sale an execution, *caveat emptor* is the rule. A mortgage and decree upon it do not establish that the mortgagor had title when he made the mortgage.

The ground for the relief sought in this case is, that the Sheriff, at the sale, said he was selling the right and title of the mortgagor; and that the crier of the sale advised a friend of his, who asked his advice aside, privately, to have nothing to do with the property; that whoever bought it would probably buy a law suit; and that the property, for which the complainant had agreed to pay \$2800, was sold for \$1400. This is the case made by the proofs.

The bill states that the crier informed the bidders "that they had best have nothing to do with the property; that they would buy a heavy law suit if they got it." If the crier, who, it seems, was clerk of the county, had undertaken to volunteer his opinion publicly to the bidders, that they had best not, &c., (as above,) and to use the influence of his judgment publicly to deter bidding, the case would have been presented in a stronger light than that in which it now appears. But, being applied to privately by a friend, and having heard what Mervine had said to him about the title, what was he to say. Could he advise his friend that the title was good. Persons who think of bidding at such a sale must make their own inquiries, and satisfy themselves as to the title. They must not depend on inquiring of the Sheriff, at the sale, as to the title. He is not supposed to know any thing more about it than they do. And if he is inquired of, all he can say is, that he is about to sell the right and title of the mortgagor.

One part of the prayer of the bill is, that Mervine's title may be definitively settled before the property be sold. This could not be done, if the sale should be set aside. In a bill by a mortgagee against a mortgagor, to foreclose the mortgage, the title of the mortgagor as against a third person cannot be established. And if, at the time of the sale under the decree in such suit, a cloud rests on the title of the mortgagor, it is his misfortune; and he cannot expect that the property will bring its full value. It seems that one of the persons who attended the sale with a view of bidding had an idea that a Sheriff, on a sale made by him, gave a warrantee deed; and when he found this was not the case he declined bidding. It had been a neighborhood talk that the title of the mortgagor was disputed; and Mervine, the complainant in this case, had himself contributed to becloud the title.

Again, the complainant was apprized that the property was advertised for sale, and chose not to attend the sale. If he desired or thought he should be able to satisfy bidders that the title was good, he should have attended the sale.

There is no allegation in the bill that the title is now free from dispute; nor does it show that any better offer has been made for the property, under the circumstances under which it was sold. Nor is there any such ground of assurance that the property would bring more at another sale, under the same circumstances as to the title, as to justify the Court in setting aside the sale that has been made.

Applications to open the biddings, before the deed has been delivered, a larger bid having been offered, have been often successful. But after the deed has been delivered, and the purchaser has gone into possession, a strong case should be required to set aside the deed. It appears to me that it would be a dangerous precedent for the Court to interfere in a case like this.

The bill will be dismissed, with costs.

Decree accordingly.

HIRAM HUTCHINSON vs. THOMAS V. JOHNSON and others.

If there be a serious question whether machinery in a building is covered by a mortgage, the court will interpose to prevent its removal, until the question can be settled.

The mortgagor should be made a party in a suit raising such question.

Hiram Hutchinson exhibited his bill, sworn to on the 15th of October, 1847, stating, that on the 25th of May, 1846, Ellison Conger, Judson Conger and Alfred Conger, of Newark, were indebted to William McBeth, of that place, in \$403 32; to Francis C. Kellinger in \$366 72; to George T. Johnson in \$344 82; to James E. Bathgate in \$230 85; to John Faulks in \$282 22; to Henry Faitoute in \$135 25; to James R. Bird in \$200; to George C. Crane in \$126 63, and to Henry Holden, Jr., in \$95, making in all \$2190 81; and that, being so indebted, the said Ellison Conger, for the purpose of securing the payment of the said moneys, made, executed and delivered to his said creditors, respectively, promissory notes for the said respective amounts, all dated May 25, 1846, and payable, respectively, in one year from that day; and that, further to secure the payment of the said moneys, the said Ellison Conger, with Mary P., his wife, and Judson Conger and Alfred Conger, executed and delivered to one Staats S. Morris, of Newark, in trust for the use and benefit of the said creditors, an indenture of mortgage, dated the same day, whereby they, in consideration of \$1, acknowledged to be paid to them by the said Morris, conveyed to him and his heirs forever a certain tract of land and premises therein described, situate in Newark aforesaid, (the boundaries whereof are given in the bill,) being the lands and premises known as the Hope Buildings, together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining; also all the estate, right, title, interest, property, claim and demand whatsoever of the parties of the first part to the said mortgage of, in, and to the same and every part and parcel thereof, to have and to hold to the said

Morris, his heirs and assigns, in trust for the use and benefit of the said creditors, and with and subject to a proviso, that if the said Ellison Conger, his heirs, &c., should pay the said moneys according to the terms, tenor and effect of the said promissory notes, respectively, the said mortgage should be void; that the said mortgage was recorded on the 1st of June, 1846.

That afterwards, on the 21st of April, 1847, the said notes, respectively, were endorsed by the said respective payees thereof, and the said mortgage was assigned by the said Morris to Andrew Lemassena; and that afterwards, on the said 21st of April, 1847, the said notes were indorsed and the said mortgage was assigned by the said Lemassena to the complainant; that afterwards, to wit., on the 21st of August, 1847, the said notes were passed and the said mortgage was assigned by the complainant to Abraham Denman; and that afterwards, to wit., on the 7th of October, 1847, the said notes were passed and the said mortgage was assigned by the said Abraham Denman to the complainant; that the complainant is the bona fide holder of the said notes and mortgage, and is the only person interested therein, and that he procured the same by paying therefor the face of the same, with a deduction of \$50; and that he has been the real beneficial owner thereof ever since the transfer of the same to the said Lemassena as aforesaid, who, as well as the said Abraham Denman, acted only as his agent and trustee.

That, at the time of the execution and delivery of the said mortgage, the said Hope Buildings therein mentioned were an extensive range of brick buildings, built for the purpose of introducing and erecting therein steam engines, for the purpose of leasing and renting out steam power, to aid in carrying on the manufacture of such products and manufactures as might be made and manufactured by any person therein who should choose to avail themselves of the said power and locate themselves in the said building.

That the said buildings have always derived a great part of their value from being adapted in their construction to contain and employ the said machinery; that such machinery consists of a steam engine, shafting and such other ap-

paratus, fixtures and machinery as is requisite to afford power in the various parts of said building, which machinery is built and incorporated with the said building by means of bolts, walls and mason work ; that entire rooms are appropriated, and constructed with a view of being appropriated to said machinery, and that the machinery could never be taken away without tearing down and destroying parts of the said building.

That the debts for the security of which the said mortgage was given were such as were due from the mortgagors to the said creditors, or *cestuis que* trust, for stock by them, severally, from time to time furnished the said mortgagors to enable them to carry on their trade ; and that the furnishing such stock was usually considered a cash transaction, and not one of credit ; that the persons so furnishing stock to the said mortgagors were, many of them persons in moderate circumstances, who would seriously feel the loss of such debts ; and that, for these reasons, it was the intention, as well of the said mortgagors as of the conveyancer who drew up the said mortgage, that it should afford the said creditors every possible security, and that it should cover all of said machinery ; and that such was the understanding of the said creditors at the time of the execution of the said mortgage ; and that such were the directions of the said mortgagors to the said conveyancer, Staats S. Morris ; and that the said Morris considered that in drawing the said mortgage in its present form he had framed it so as to cover as well the said buildings and machinery as the said land. And the complainant submits that such is the effect of the said mortgage, and that the said machinery was at the time of the delivery of the said mortgage so incorporated and identified with the mortgaged premises as to be a part of the realty ; and that the said mortgage, as well from the intention of the mortgagors and the intendment of law as the language of the same, covers the said machinery.

That it has always been understood that the said mortgage covered the said machinery, and that it was part of the estate ; that it has been so understood by numerous creditors of the said mortgagors, and, as the complainant believes, by those who are subsequent to him in their mortgages on the said premises ; that although many creditors

of the mortgagors have had judgments against them, and have sold, by virtue thereof, all their available property, yet no pretence has ever been made that the said machinery was personal property distinct from the said real estate.

That, before the machinery above referred to and afterwards specified in the bill was placed into and incorporated with the said buildings, the said mortgagors made, executed and delivered to one Mary Jones two mortgages on the said lands and buildings, which were duly acknowledged and recorded, and constituted the first lien on the said lands and buildings; but, as the complainant is informed and believes, did not in any manner charge, incumber or affect the said machinery.

That the said mortgagors then executed two others mortgages, to secure sums of money therein mentioned, one to Andrew Stark, and the other to Charles A. DeHart, which mortgages were all incumbrances on the said lands and buildings prior to the mortgage of the complainant; and also executed six other mortgages, to secure the sums therein respectively mentioned; which six last mentioned mortgages cover the same lands, buildings and machinery as are covered by the complainant's said mortgage; and which mortgages were given, one to Alfred Mead, one to Thos. V. Johnson, one to Lewis C. Grover, and, as the complainant is informed and believes, assigned by said Grover to said Johnson, one to Staats S. Morris, one to George Lewis, and one to Edward S. Inness and Joseph R. Rollinson; and which said last six mortgages were recorded, as the complainant is informed, in the order of priority in which they are here stated; by virtue of which said last six mortgages the said Mead, Johnson, Morris, Lewis, and Inness and Rollinson claim to have some lien upon the machinery which was situated in the said Hope buildings at the time the complainant's mortgage was executed; but that the said last six mortgages are subsequent to the mortgage of the complainant.

That, on the 14th of April, 1847, a final decree was made in this court in relation to the lands and premises covered by the said mortgages given to Mary Jones, and in relation to no other property, in a certain cause therein depending, wherein the said Mary Jones was complainant, and the said Stark, John-

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son, Morris, Lewis, DeHart, Mead, Inness, Rollinson and others were defendants.

That by the said decree it was decreed that the premises mentioned in the mortgages of the said Mary Jones, the complainant in that suit, but not the machinery mentioned in the mortgages of the said Mead, Johnson, Lewis and others, defendants therein, and which was not contained in the mortgages of the said Mary Jones, should be sold to pay the mortgages of the said Mary Jones, and of such defendants in the said suit as held mortgages on the premises so ordered to be sold, according to the priorities of the same, as settled by the said decree.

That the Sheriff, by virtue of a *fi. fa.* issued on the said decree, did, on the 27th of September, 1847, *sell* and *strike* off, at public auction, to the complainant, the premises so directed to be sold, for \$7,000; and on the 6th of October, 1847, delivered to the complainant a deed therefor; that the Sheriff, with the proceeds of said sale, paid off, according to the directions of the said decree, all the mortgages which, as hereinbefore stated, were prior to the mortgage of the complainant, and with the residue of the said proceeds did pay on the mortgage of the complainant the sum of \$553 28.

That the said Charles A. DeHart, on or about July 29, 1847, became the purchaser of the said mortgaged premises, for a period of one year, at a sale of the same then made under the provisions of an act of the Legislature, entitled a further supplement to the act incorporating the city of Newark, authorizing the sale of real estate in Newark for taxes; and that, on or about the 7th of August, 1847, the said Charles A. DeHart procured all the interest by him so obtained to the said premises to be conveyed by the collector of arrears of taxes for the city of Newark to the said Thomas V. Johnson; and that the said Johnson thereupon took possession of the said mortgaged premises, or of such part thereof as contained the said machinery; that by an act of the Legislature, passed January 26, 1844, provision is made for the redemption, by the lawful owner, of property so sold for taxes, within one year after such sale, by paying or tendering to the purchaser at such tax sale the amount paid by him

for premises so sold for taxes, with an addition at the rate of 12 per cent. per annum thereon from the time of such sale.

That the complainant, after he had received the said Sheriff's deed, and on the 6th of October, 1847, tendered to the said Thomas J. Johnson \$106 50 in specie, being the full amount so paid by said DeHart to the said collector for the said property, with the addition of 12 per cent. thereon as aforesaid. That the said Johnson then refused to receive the money so tendered, or to deliver up the deed executed by the collector to him, or to give the complainant possession of the said premises; whereupon the complainant made an affidavit of the said facts, according to the act last aforesaid, and delivered such affidavit to the Treasurer of the city of Newark, and thereupon paid to the said Treasurer the said last mentioned sum of money, who gave the complainant a receipt for the same, annexed to the said affidavit, specifying, in the said receipt, that the said money was paid for the purpose of redeeming the said premises; and gave the complainant such certificate as is required by the said last mentioned act, which certificate being duly acknowledged by the said Treasurer, was thereupon filed in the office of the Clerk of the county of Essex; and the said Johnson was also informed by the said Treasurer that the complainant had paid him the said sum and the said interest, and that the said Johnson could have the same at any time; by virtue of which premises, the plaintiff became entitled to the immediate possession of the said mortgaged premises; and that he demanded possession thereof of the said Johnson, who refused to deliver possession to him, and still unlawfully prevents the complainant from taking possession of the said premises.

That the said DeHart, or the said Johnson claiming under him, never acquired by the purchase at the said sale for taxes anything more than a lien on said premises, which lien has now been extinguished by the complainant's having followed the directions of the said act for that purpose enacted; but by reason of the anomalous proceeding by which the said lien is by said act directed to be extinguished, the complainant would be embarrassed, if not entirely defeated, in acquiring the possession of the said premises by the usual remedies for that end afforded in

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courts of law. That the said amount of taxes and interest was also tendered to the said Johnson, on the 28th of September, 1847.

That the said Johnson, so having possession of the said premises, on the 4th of October, 1847, undertook to sell at public vendue, in Newark, the said machinery, and gave out at the said sale that he would, immediately on the said sale being made, deliver the said machinery.

That the complainant and the said Abraham Denman, who was then the assignee of the complainant's said mortgage, by F. T. F., their attorney, forbade the sale of the said machinery, because the said Johnson had no authority to sell the same; because the said machinery was so incorporated with the said building that it could not be separated therefrom without waste and injury to the said buildings and machinery, and because the mortgage now on the property of the complainant was the first lien thereupon; but that Johnson disregarded such notice and proceeded with the sale, and the machinery was struck off for \$2,885, either to the said Johnson or to the said Inness & Rollinson.

That the complainant and the attorney of the said Denman demanded of Johnson some writing to show the sum for which the machinery was sold, and who was the purchaser thereof; but that Johnson refused to give any information or any voucher or security in relation to the transaction.

That, on the 6th of October, 1847, Johnson, with a large number of men, commenced to break the walls and mason work of the said Hope buildings, for the purpose of disconnecting the said machinery from the said building, and was so engaged during the whole of that day, and thereby did great damage as well to the said machinery as to the said building.

That Johnson, on the said 6th of October, sent off a large and valuable part of said machinery to the city of New York, and near midnight of the same day was engaged disconnecting and carrying away the residue of the same, and was only prevented from so doing by the order of this court; that the reason of Johnson's making such haste to extricate the said machinery was, that he expected and feared the injunction of this court to

arrest his progress, knowing that he was unlawfully employed ; that Johnson has at this time a considerable part of the said machinery on the wharf in Newark, which together with such machinery as remains in the building, he intends, unless restrained by the injunction of this court, to transport to the city of New York ; that, in consequence of said Johnson's so unlawfully selling the said machinery, it sold for a price far below its real value.

That Johnson now holds on to the possession of a large part of the said buildings, without deriving any benefit therefrom, as the same is unoccupied ; that the windows of the said buildings are out, and the doors are off, and that Johnson will not permit the complainant even to put the said buildings in such situation as to prevent their receiving further damage.

That there is due to the complainant, on his said mortgage, \$1,811 63 ; and that he has applied to the mortgagors to pay the same, and to the said Johnson, Mead, Morris, Lewis, Inness and Rollinson to pay the same, or to release to him all their right, title, and equity of redemption of, in and to the said mortgaged premises, and suffer him peaceably to enter and possess the same.

The bill prays that the defendants may answer the premises, and that Johnson may set forth what machinery he has removed or carried, or suffered to be removed from the said buildings ; and that the defendants may be decreed to pay to the complainant, by a short day, what may be found to be due him on the said notes and mortgage ; and that, on failure thereof, they may be foreclosed of and from all right and equity of redemption of, in and to the said machinery so as aforesaid situated in the said Hope Buildings at the time of the delivery of the complainant's mortgage, and of all right and title to the said lands and premises so conveyed to the complainant by the said Sheriff, by reason of any pretended lien arising from the purchase of the same by the said DeHart, for taxes, as aforesaid, or from the conveyance by the said Collector to the said Johnson ; and may deliver possession of the said machinery, lands and premises to the complainant ; and on failure to pay what may be found due to the complainant, that the said machinery may be sold to pay the same, and that Johnson may be enjoined from resisting the complain-

ant in taking possession of the said lands and premises so redeemed by him from the lien which the said DeHart and Johnson once had thereon for the money paid by DeHart for taxes on the said premises; and that the said Johnson and Inness & Rollinson, their agents, &c., may be enjoined from injuring the said buildings, and from moving or in any manner disturbing any machinery therein contained, or from taking or removing from Newark any of the machinery which was in the said buildings on the 30th of May, 1846, the time of the delivery of the complainant's said mortgage, or at any time thereafter, and from selling any part of the said machinery; and that it may be referred to a Master to ascertain and report what machinery has been removed from the said buildings by the said Johnson or any other of the defendants, and what was the true value of such machinery immediately before it was removed; and that Johnson, or such other defendant so removing the same, may be decreed to pay to the complainant the value of such machinery before removed with interest thereon, and for further relief. Thos. V. Johnson, Alfred Mead, Staats S. Morris, George Lewis, Edward S. Inness and Joseph R. Rollinson are made defendants.

On the reading of this bill, *F. T. Frelinghuysen* and *Wm. Pennington* moved for an injunction pursuant to the prayer thereof. They cited *Co. Litt.* 53; 2 *Smith's Leading Cases*, 160, 1, 2; *Ib.* 99, 16, 7, 8; 1 *East.* 38; 5 *Peters L. Ab.* 702; 1 *Atk.* 175; 16 *Eng. C. L. Rep.* 61; 7 *Ib.* 272, *Grady on Fixtures*, 8, 13; 1 *H. Bl.* 261.

O. S. Halsted, jun'r, and *A. Whitehead*, contra. They cited 3 *Green's Ch.* 148; 1 *John. Ch.* 317; 6 *Ib.* 46; 7 *Ib.* 333; 2 *Green's Ch.* 279; *Hopkins' Ch. Rep.* 135; 17 *John. Rep.* 116; 9 *Coun. Rep.* 63; 3 *Atk.* 13; 5 *Vern. Rep.* 142; 14 *Mass. Rep.* 352; 6 *John. Rep.* 5; *Drury on Inj.* 187.

THE CHANCELLOR. The question is, whether the injunction prayed for should be granted on the facts stated in the bill.

The main question involved is one of great importance, and in reference to which, and to the decisions touching it, it may be said that there is great uncertainty and perplexity.

The decision on the present motion is not founded on any ultimate conclusion on the main question. I go on the ground that the facts stated in the bill, present, in my judgment, a question within the jurisdiction of the Court, and in reference to which a party to this controversy should not be permitted to act on his own construction of the complainant's mortgage, and remove the property claimed to be covered by it out of the jurisdiction of the Court.

To refuse the injunction now, would be to decide, that the complainant cannot, under the facts stated in the bill, or any proofs that may be made by him under the bill, have any lien on the machinery by virtue of his mortgage, because a denial of the injunction would be leaving Johnson at liberty to carry out his design of removing the property out of the State, and thus out of the reach of any decision the court might make on the question whether the complainant has such lien. It is no answer to this to say that Johnson is a man of responsibility. If the complainant has a lien on the machinery, no personal responsibility can be substituted for such lien without his consent.

As to the argument that Johnson was a mortgagee in possession of the machinery, and had, therefore, a right to sell it, this assumes that it was personal and not a part of the realty. It assumes, too, that by his purchase of the realty for taxes he was in possession of the machinery as personal property, and that after Johnson's right in the realty was extinguished by the tender of the amount paid at the tax sale, and the interest thereon, in compliance with the provisions of the statute for redeeming property sold for taxes, he remained in possession of the machinery as personal property; and assumes, that where there are several mortgages on personal property, and one of the mortgagees is in possession, he may sell it at public auction on notice.

If the complainant's mortgage covered the machinery, it is a plain case for the interposition of the court to prevent its removal; and if, under any proofs that may properly be made under the bill, it may appear that the complainant is right in his construction of his mortgage, it is proper that the court should hold the property within its jurisdiction

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till the question involved can be satisfactorily decided.

An injunction will be allowed. The mortgagors should
be made parties defendants.

Injunction allowed.

JOSHUA DOUGHTY vs. THE SOMERVILLE AND EASTON RAILROAD CO. and WILLIAM J. LEWIS.

Under the Constitution of New Jersey, adopted June 29th, 1844, an act of the Legislature cannot authorize a Railroad Company incorporated by it to take land for the construction of their road without first making compensation therefor to the owner.

The act incorporating "The Somerville and Easton Railroad Company" does not authorize the taking of land without first making compensation therefor.

Semble, that under this act the Company cannot apply for commissioners of valuation and damages until the route of the whole road be located.

But the Chancellor refused an injunction to restrain the Company from applying for commissioners to value a part located, though the whole route was not located.

The assertion of a right, the existence or non-existence of which is properly determinable at law, and the exercise of which will do no injury to the party denying it, is no ground for an injunction.

On the 5th of February, 1848, Joshua Doughty exhibited his bill, stating, that on the 26th of February, 1847, the Legislature of this State passed an act to incorporate "The Somerville and Easton Railroad Company;" that by the 6th section of the act it is enacted, that the President and Directors of the said Company be authorized and invested with all the powers necessary and expedient to survey, lay out and construct a railroad or lateral road from one or more suitable place or places in the village of Somerville, northerly, in the most direct and feasible route to the Musconetcong valley, passing to the north, or within two miles of the village of Clinton, in the county of Hunterdon; thence down the valley of the Musconetcong, or any valley northward, to the valley of the Delaware; thence up the Delaware to one or more suitable place or places within two miles of the Easton Delaware bridge, opposite the village or borough of Easton, in Pennsylvania; with a branch from any convenient point on the route of said road to the village of Belvidere, not exceeding 100 ft. in width; with as many sets of tracks and rails as they may deem necessary; and it shall and may be lawful for the said President and Directors, their agents, &c., to enter, at all times, upon all lands and waters, for the purpose of exploring, surveying, levelling or laying out the route or routes of such railroad or lateral or branch roads, and of locating the same; and to do and erect all

necessary works, buildings and appendages thereof, doing no unnecessary injury to private or other property; and when the route or routes of such road, or lateral and branch roads, shall have been determined upon, and a survey of such route or routes deposited in the office of the Secretary of State, then it shall be lawful for the said Company, by its officers, agents, engineers, superintendents, contractors, workmen and other persons in their employ, to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect embankments, bridges, fences, and all other works necessary to lay rails, and to do all other things which shall be suitable or necessary for the completion or repair of the said road or roads; subject to such compensation as is in the said act after provided: Provided always, that the payment, or tender of the payment, of all damages for the occupancy of lands through which the said road or roads may be laid out be made before the said Company shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said road or roads, unless the consent of the owner or owners of such lands be first had and obtained.

That by the 7th section of said act it is enacted, that when the said Company, or its agents, cannot agree with the owner of the required lands or materials for the use or purchase thereof; or when, by reason of the legal incapacity or absence of such owner, no such agreement can be made, a particular description of the land or materials so required shall be given in writing, under the oath or affirmation of some engineer or proper agent of the Company, and also the name of the occupant or occupants, if any there be, and of the owner or owners, if known and their residence, if it can be ascertained, to one of the Justices of the Supreme Court, who shall cause the Company to give notice thereof to the persons interested, if known, and in this State; or if unknown, or out of this State, to make publication thereof as he shall direct; and to assign a particular time and place for the appointment of the commissioners after named in the act; at which time, upon proof of the service or publication of such notice, he shall appoint, under his hand and seal, three disinterested, judicious and impartial freeholders commission-

ers to examine and appraise the said land or materials, and to assess the damages, upon such notice to the persons interested as shall be directed by the Justice making such appointment. And it shall be the duty of the said commissioners (first having taken and subscribed an oath, &c.,) to meet, at the time and place appointed, and to view and examine, &c.; and to make a just and equitable estimate or appraisement of the value of the same, and assessment of damages, as shall be paid by the said Company, for such lands or materials and damages aforesaid; which report, under the hands and seals of them or any two of them and filed, shall be made in writing within ten days thereafter, together with the aforesaid description, appointment and oaths, in the Clerk's office of the county in which the lands are situate; which report, or a certified copy thereof, shall, at all times, be considered as plenary evidence of the right of the Company to have, hold, use, occupy, possess and enjoy the said land or materials, or of the owner to recover the amount of said valuation, with interest and costs, in an action of debt against the Company, if they shall neglect or refuse to pay the same for twenty days after demand made of their Treasurer; and shall, from time to time, constitute a lien upon the property of the Company in the nature of a mortgage.

That the complainant resides in Somerville. That about 1836 he bought a large property in the upper part of said village, including about 60 acres of land, for which he paid \$11,000. That he has since expended large sums in improving the said property; has laid out a part of it in lots; and has erected on many of them stores and dwelling houses, and other improvements; reserving to himself, in front of his mansion house thereon, a necessary and convenient avenue to the main street of said village, and a door yard of convenient and moderate size. That, on or about Jan'y 25th, 1848, the said Company deposited, or caused to be deposited, in the office of the Secretary of State a certain paper writing purporting to be a location of the said railroad from Somerville to the White House road. That by the said writing it appears that the line of said road, as located, runs through the lands of the complainant as follows: (giving the courses and distances through his lands,) making,

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in the whole, the distance of 842 feet, in a curvilinear direction, through and over his lands. That the said line is described in the said writing as being the central line; and it is also stated in said location, that the width of the said railroad is 100 feet, being 50 feet on each side of said line, except through Isaac Southard's land, where the width is 30 ft. on the N. E. side, and 75 ft. on the S. W. side of said central line. That the said central line passes the dwelling house of the complainant at a distance of about 50 ft. from the N. E. corner of said house.

That, since the filing of the said location, the Engineer of the Company has stated to the complainant that it was the intention of the Company not to take, in the formation of the road over the complainant's land, more than 40 ft. in width; and that, in passing the complainant's house, they would occupy only 15 ft. on the southerly side of said line, and 25 ft. on the northerly side; but that if this be so, and he has no assurance or knowledge of it other than as above stated, the southerly side of said road will pass within about 30 ft. of his said house, and take a part of his door yard; and that, in either case, he must sustain great inconvenience and damage, and his property be irreparably injured.

That the Company have not agreed with him for the use or purchase of any of his land through or on which they have located their said road.

The bill then sets out a notice, given to him by the Company, that they had, upon the affirmation of their Chief Engineer, given to the Chief Justice a particular description of his lands required for the said road, and made known to him that they could not agree with the complainant for the purchase thereof; and had applied to him for the appointment of commissioners to examine and appraise, &c.; and that the Chief Justice had assigned the 27th of Feb., then next, at 3 P. M., at his office in Trenton, for the appointment of said commissioners.

That, by the terms of the said charter, power is given to the Company to construct a continuous line of said road from Somerville to a point near Easton; and that when the said route of the said road shall have been determined upon, and a survey of said route deposited in the office of the Secretary of

State, then the Company may apply to a Justice of the Supreme Court for the appointment of commissioners to, &c. That the Company have not deposited any survey of the route of said road, as required by the said act, or any other survey than the one before referred to, and which is described as a "Location of the Somerville and Easton Railroad from Somerville to the White House road;" and he submits that, until such survey is made, the Company have no right to have commissioners appointed. That the Company have no rights or powers save those which have been conferred by the charter. That, under pretence of making a road from Somerville to Easton, a distance of about 34 miles, they cannot take private property to construct a road from Somerville to the White House road, being a distance of about 8 miles only, or to any other point short of the point of termination specified in their charter. That the said charter is a contract which the complainant, and all other landholders affected by the route of the said road, have a right to enforce in this court; and that the Company, having neglected to comply with a plain and salutary provision of their charter, should be restrained by this court from further proceeding to have commissioners appointed.

The bill further states, that by the said 7th section of the said charter it is provided, that the report of the said commissioners shall be filed, &c.; and that the said report, so filed, shall be plenary evidence of the right of the Company to occupy and possess the land so to be taken and assessed; and that although, by the 8th section, power is given to the Supreme Court to set aside the said report, at the next term of said court, on good cause shown, and to direct a jury to be struck for the trial of the question of damages between the landholders and the Company, on the application of any land owner who shall be dissatisfied with said report; yet the said 8th section provides, that such application shall not prevent the Company from taking the said land upon the filing of the said report. And the complainant submits, that by the said act the Company are authorized and empowered to take private property, for their use, without having first made compensation to the owner; and that the said act is against the constitution of this State, and therefore

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void. Among the pretences and answers thereto in the bill, is the following : And the said confederates pretend, that this court has no authority or jurisdiction in the premises ; and that, if the confederates have not complied with their charter, the complainant may appear before the Chief Justice and object to the appointment of commissioners : where as, the complainant charges, that the Company are bound by their contract ; and that it is peculiarly the province of this court to compel the performance of contracts, and to restrain the Company from exceeding its authority, to the injury of individuals ; and more especially as it is doubtful whether any adequate or sufficient remedy can be had in any other tribunal.

The bill prays that the said charter may be decreed to be contrary to the constitution of this State and void ; and that the Company, and Wm. F. Lewis, their Chief Engineer, may be restrained by injunction from further proceedings for the appointment of commissioners, upon their said application to the Chief Justice, or upon any other application ; and from having any assessment of damages made to the complainant ; and from taking possession of, using or occupying, in any way, any land of the complainant ; and for further relief. The injunction was granted as prayed.

On the 8th of Feb., 1848, the injunction was modified so as to permit the appointment of commissioners, without prejudice to the questions involved. On the 21st of February, 1848, a motion was made to dissolve the injunction, without answer.

An affidavit of the President of the Company was read on the part of the Company, stating that the Company have had several routes surveyed between Somerville and Easton, for the purpose of locating the road between those points, and have expended upwards of \$2,500 in making such surveys ; that the Directors, being very anxious to get their road surveyed and located, and as much of it as practicable put under contract, employed an engineer for that purpose, very soon after the appointment of Directors ; that, the engineer employed failing to take charge of the work according to agreement, it became necessary to employ another engineer, which was done as soon as possible, and the

road put under his charge. The work from Somerville to the White House road, about nine miles, being comparatively light, the Directors were advised that that portion of the road would be finished by the 1st of January last, but this could only be done by employing the engineers of the Company entirely upon that portion of the road; that it would take several months to locate the whole road to Easton, and it could not be done without abandoning all expectation of completing any portion of the road without great delay. The Directors therefore determined that it was for the interest of the stockholders, as well as for the accommodation of the public, that they should direct all the energies of the Company to completing the road to the White House, and have accordingly done so; that the people living in that portion of the county expressed a great anxiety that this should be done. The deponent says that this is the only reason that the whole road from Somerville to Easton has not been located; and that it has been and is the intention of the Directors to have their whole road located as soon as the engineers can be spared from the portion of the road now under contract. He further says, that the Company have a large number of men at work on that portion of the road between Somerville and the White House, and expect, if not unnecessarily delayed and harassed by the landholders, to have it completed by June next; and that if they are enjoined from taking lands by assessment, the road must for the present be abandoned, to the very great damage of the Company, and the contractors who are constructing the road.

He further says, that the complainant has declared that the Company should never go through his lands where it is at present located, and that he would law the Company to his last moment, or words to that effect.

He further says, that it was in consequence of the delay occasioned in procuring the engineer, and also from the fact that the work has turned out much more difficult than was anticipated, that it was found impossible to finish the road at the time first contemplated.

B. Williamson and *F. T. Frelinghuysen* in support of the motion. They cited 1 *Baldwin's Rep.* 206; the act incorporating the Company, in 2 *Harr. Laws*, 284. 4

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P. D. Vroom and A. Whitehead, contra. They cited 2 *John. Ch.*; 6 *Eng. Cond. Ch.* 548, 551; 1 *Mylne & K.* 154; 1 *Railway Cases*, 153, 518, 598, 636; 2 *Meeson & Welsby*, 824; 2 *Young & Colyer*, 618; 7 *Man. & Granger*, —; 49 *Eng. C. L. Rep.* 288; 1 *Baldwin's Rep.* 225, 228, 231; 4 *Burr.* 2244; 1 *Cowp.* 26; 2 *Harr. Rep.* 30; 3 *Green's Rep.* 57, 339.

THE CHANCELLOR. The provisions of the charter affecting the questions now raised are as follows: The Company is incorporated under the name of "The Somerville and Easton Railroad Company," with a capital of \$1,200,000, with liberty to increase it to \$2,000,000.

Sec. 6. The President and Directors of the Company are authorized and invested with all the rights and powers necessary and expedient to survey, lay out and construct a railroad, or lateral roads, from Somerville, northerly, in the most direct and feasible route, to the Musconetcong valley, passing within two miles of Clinton; thence to the valley of the Delaware; thence up the Delaware to a place or places within two miles of the Easton Delaware Bridge, opposite Easton, Pennsylvania; with a branch from any convenient point on the route of said road to Belvidere; and it is made lawful for the said President and Directors, their agents, &c., to enter, at all times, upon any lands and waters, for the purpose of exploring, surveying, leveling or laying out the route or routes of such railroad, or lateral and branch roads, and of locating the same, and to do and erect all necessary works, buildings and appendages thereof, doing no unnecessary injury to private or other property; and when the route or routes of such road, or lateral and branch roads, shall have been determined upon, and a survey of such route or routes deposited in the office of the Secretary of State, then it is made lawful for the said Company, by its officers, agents, engineers, superintendents, contractors and workmen to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect embankments, bridges, ferries, and all other works necessary to lay rails, and to do all other things which shall be suitable or necessary for the completion or repair of the said road or roads, subject to such compensation as is afterwards

provided by the act ; provided always, that the payment or tender of payment of all damages for the occupancy of lands through which the said road or roads may be laid out, be made before the Company, or any person under their direction or employ, shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said road or roads, unless the consent of the owner of such lands be first had and obtained.

Sec. 7. When the Company cannot agree with the owner or owners of such required lands for the use or purchase thereof, a particular description of the lands so required for the use of the Company in the construction of said road shall be given in writing, under the oath of some proper agent of the Company, and also the name and residence of the owner, to a Justice of the Supreme Court, who shall cause the Company to give notice to the person interested, and to assign a time and place for the appointment of commissioners ; at which time he shall appoint three freeholders commissioners to examine and appraise the land, and to assess the damages, upon notice to be given to the person interested of the time and place, &c. ; and it shall be the duty of the commissioners to meet at the time and place appointed, and to view and examine the land, and to make a just and equitable appraisement of the value thereof, and assessment of damages, as shall be paid by the Company for such lands and damages, which report shall be made in writing, under the hands and seals of the commissioners, or any two of them, and filed, within ten days thereafter, together with the aforesaid description of the land and the appointment aforesaid, in the Clerk's office of the county in which the land is situate ; which report, or a certified copy thereof, shall at all times be considered as plenary evidence of the right of the Company to have, hold, use, occupy, possess and enjoy the said land, or of the owner to recover the amount of said valuation with interest and costs, in an action of debt against the Company, if they shall neglect or refuse to pay the same for twenty days after demand made of their treasurer ; and shall, from time to time, constitute a lien upon the property of the Company in the nature of a mortgage.

Sec. 8. In case the Company or the owner of the said land shall be dissatisfied with the report of the commissioners, and

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shall apply to the Supreme Court, at the next term after the filing of the said report, the court shall have the power, upon good cause shown, to set the same aside, and thereupon to direct a proper issue, and to order a jury to be struck, and a view of the premises to be had, and the said issue to be tried at the next Circuit in said county; and it shall be the duty of the jury to assess the value of the land, and damages sustained; and if they find a greater sum than the commissioners have awarded, then judgment thereon, with costs, shall be entered against the Company, and execution awarded therefor; but if the jury shall be applied for by the owner, and shall find the same or a less sum than the Company shall have offered or the commissioners awarded, then the costs to be paid by said applicant, and either deducted out of the said sum found by the jury, or execution awarded therefor, as the court shall direct; provided, that such application shall not prevent the Company from taking the said land upon the filing of the aforesaid report.

Sec. 13. The said Company may have and hold real estate at the commencement and termination of said road or roads at Somerville and the Delaware river, and at intermediate depots upon the line of said road, not exceeding five acres at each place, and may erect such buildings and improvements thereon as they may deem expedient; and shall also have the privilege to erect, build, and maintain, at the Delaware river, or within thirteen miles of the borough of Easton, such wharves, piers, bridges and other facilities as they may think expedient and necessary for the full enjoyment of all the benefits conferred by this act; which said lands shall be obtained in the manner provided for in the 7th section of this act.

Sec. 14. As soon as the said road with its appendages shall be finished so as to be used, the President and Treasurer of the Company shall file, under oath or affirmation, a statement of the amount of the cost of said road, including all expenses, and the amount of all purchases made by virtue of this act, in the office of the Secretary of State; and annually thereafter, make, under oath or affirmation, a statement to the Legislature of the proceeds of the road, until the net income thereof shall amount to 6 per cent. upon the amount of its cost; and as soon as that takes

place, the Company shall pay to the Treasurer of the State a tax of one and one half per cent. on the cost of the road annually thereafter.

Sec. 15. The Company may borrow, from time to time, such moneys as shall be necessary to build or repair said road and furnish engines, &c., and secure the payment thereof by bond and mortgage on the road, privileges and franchises of the Company.

Sec. 16. At any time after 50 years from the completion of the road, the State may cause an appraisement thereof and of its appendages to be made by, &c.; and thereupon the State shall have the privilege, for three years, of taking the said road, upon the payment to the Company of the amount, &c., within one year after electing to take the road; and it shall be the duty of the President of the Company to lay before the Legislature, under oath or affirmation, when they shall so request, a full and fair statement of the cost of said road, and of all the receipts and disbursements of the Company.

Sec. 17. If the said railroad shall not be completed and in use at the expiration of seven years from June 4, 1847, the act shall be void.

Sec. 18. The Legislature shall have the right to subscribe for the stock of the Company to the amount of \$25,000, at any time before or within twelve months after the said road or roads are completed.

Sec. 19. This act shall be deemed and taken to be a public act, and be recognized as such in all courts, &c.

The Constitution of this State, adopted June 29, 1844, provides, in Art. 1, ¶16. that "Private property shall not be taken for public use without just compensation; but land may be taken for highways as heretofore, until the Legislature shall direct compensation to be made.

And in Art. 4, §7, ¶9, that "Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners."

I am of opinion that, under the last clause of the Constitution, this corporation could not be authorized, by act of the Legislature, to take land for the construction of their road, without compensation therefor being first made to the owner.

Does the act incorporating this Company authorize them to do so?

The 6th section, in view of the constitutional provision, and which must be taken to have been the view of the Legislature, must be read, I think, as authorizing the Company to lay out and construct a railroad; to enter upon lands for the surveying and laying out the route; to enter upon and take the land for the purpose of constructing the road; provided the payment or tender of payment of all damages for the occupancy of the land through which the road is so laid out be made before the Company enter upon the land, except for the purpose of surveying and laying out the road; that is, before the Company shall enter for the purpose of constructing the road, and thus appropriating it to their use, which, I apprehend, the Legislature understood to be the *taking* of the land, in the sense of that word as used in the Constitution. The entry for the purpose of surveying and laying out the road was not considered as a taking of the land.

We have, then, a provision in this section that, before the Company can take the land, they must pay or tender all damages for the occupancy of it.

But no mode of ascertaining the damages is, thus far, provided; that is done by subsequent sections of the act; and the act would have been incomplete if it provided no mode of ascertaining the damages which the Company are to pay or tender before taking the land. This shows that the provision in this section for such payment or tender has a connection with the subsequent provisions of the act. The damages must be ascertained before they can be paid or tendered.

The 7th section provides, that when the Company cannot agree with the owner of the land, or when, by reason of the legal incapacity or absence of the owner, no agreement can be made, a description of the land, with the name and residence of the owner, shall be given in writing to a Justice of the Supreme Court, who shall appoint commissioners to appraise the lands and assess the damages; that it shall be the duty of the commissioners to make an appraisal "of the value of the same and assessment of the damages as shall be paid by the Company for

such lands and damages aforesaid ;” which report shall be in writing, and filed, &c., to remain of record ; which report shall at all times be considered as plenary evidence of the right of the Company to have, hold, use, occupy, possess and enjoy the land, that is, upon the payment or tender, according to the proviso of the 6th section, of the value of the land and assessment of the damages as shall be paid by the Company for such lands and damages aforesaid, reported by the commissioners under this 7th section. The latter part of this 7th section, viz. : “or of the said owner (*i. e.* that the report shall be plenary evidence of the right of said owner) to recover the amount of said valuation, with interest and costs, in an action of debt against the Company, if they neglect to pay for twenty days after demand, and shall from time to time constitute a lien on the property of the Company, in the nature of a mortgage,” applies to the owners mentioned in the first part of this 7th section, with whom, by reason of their legal incapacity or absence, no agreement can be made.

There can be no doubt that if the charter stopped here, it would be constitutional. It is not claimed that the ascertainment by commissioners of the value and damages to be paid is unconstitutional.

The 8th section provides, that if the Company, or the owner of the land shall be dissatisfied with the report of the commissioners, and shall apply to the Supreme Court, the court shall have power, upon good cause shown, to set the same aside, and thereupon to order a trial by jury ; and that the jury shall assess the value of the land and damages sustained ; and if they find a greater sum than the commissioners awarded in favor of the owner, then judgment thereon, with costs, shall be entered against the Company, and execution awarded therefor ; but if the jury be applied for by the owner, and shall find the same or a less sum, then the costs to be paid by said applicant, and either deducted out of the sum found by the jury, or execution awarded therefor, as the court shall direct, provided that such application shall not prevent the Company from taking the land upon the filing of the said report. If this section means, that the Company may express dissat-

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isfaction with the report, and may, notwithstanding such dissatisfaction expressed, take the land upon the filing of the report, without paying or tendering the amount found by it, and apply for a jury, and that the owner is only to have his judgment and execution for the amount found by the jury, and to rely on that, this part of the law would be unconstitutional.

This cannot be the meaning of this section as it stands connected with the other provisions of the charter. We have seen that if the Company conclude to take the land on the filing of the commissioners' report, they can only do it by paying or tendering the amount of that report. The proviso at the end of the 8th section, that such application shall not prevent the Company from taking the land upon the filing of the commissioners' report, means taking in such way and on such terms as the charter authorizes them to take it, viz. : by paying or tendering the amount of that report.

It may be that the words "such application" in this proviso, relate to the application spoken of in the latter part of the section ; the last provision of the section, preceding the proviso, is, "but if the jury shall be applied for by the owner, and shall find the same or less, &c., the costs shall be paid by the applicant ;" (then follows the proviso,) provided such application shall not prevent the Company from taking the land upon the filing of the report. I am inclined to think, that the Legislature did not contemplate that the Company would pay the amount reported by the commissioners, and take the land, and also apply for a jury.

But this section does not give the Company the right to apply for a jury ; and possibly the meaning may be that upon either application the Company may take the land upon the filing of the commissioners' report ; but certainly the court would not so construe the act that they might do it, on their own application for a jury, without first paying or tendering the amount found by the commissioners. It cannot be supposed that the Legislature, after making the proviso contained in the 6th section, would enact another section to operate entirely independent of that proviso, by which the Company could take the land without first paying or tendering. The proviso in the 6th section

must therefore be held to govern the whole charter; and the 8th section must receive a construction, if possible, consistent with that proviso. Its provisions are somewhat blind, and it may be that it was carelessly drawn. If it was intended to provide a mode of taking the land without reference to the proviso in the 6th section, and independently thereof, its provisions are imperfect to that end. There is no provision in it that if the jury find the same or a less sum than the commissioners awarded, judgment shall be entered and execution awarded for it. The provision is, that if the jury shall find the same or less sum, and the jury was ordered on the application of the owner, the owner shall pay the costs, and that the costs shall either be deducted out of the sum found by the jury, or that execution shall be awarded therefor. This provision is consistent with the proviso to the 8th section, "that such application shall not prevent the Company from taking the land upon the filing of the report," (upon paying the amount of the report, as before construed to mean.) If the owner applies for the jury, the Company may, or not, before the jury trial, take the land by paying or tendering the amount of the commissioners' report. If they do pay or tender the amount and take the land, then, if the jury find the same or a less sum, the act seems to contemplate nothing further to be done except in reference to costs. These costs are to be either deducted, as aforesaid, or execution awarded therefor, as the court shall direct. This seems to provide for the state of things that may then exist, according as the Company may have taken the land and paid the money, or not. If the owner applies for the jury, and the same or a less sum be found, there is no provision for a judgment against the Company. According to my construction of the act, the Company may, at any time after the award of the commissioners, pay the amount of the award and take the land. If they have paid and taken the land, then, if the jury find the same sum, the matter is ended, except an execution against the owner for costs; and the provision seems to be the same if the Company has paid the award and the jury find less than the award. There seems to be no provision for the Company to recover back the excess of the award over the sum found by the jury. If the Company

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have not paid the award and taken the land, and the jury find the same sum or less, then the costs are to be deducted out of the sum found by the jury. But there is no provision for a judgment, in this state of things against the Company for the amount found by the jury, or for the amount of the award. Are the Company, then, to take the land without paying, and the owner not even to have a judgment for it? I apprehend that the absence of any provision for a judgment, in this part of the section, shows clearly that it was contemplated that the Company, under the charter as a whole, could not take the lands without first paying.

Again: a preceding part of this section provides that if the jury find a greater sum than the commissioners awarded, (whether the Company or the owner applied for the jury,) judgment thereon, with costs, shall be entered against the Company, and execution awarded therefor. Does this necessarily mean that the Company may thereupon take the land without first paying? I apprehend not. In reference to this, as well as to the succeeding clause of this section, (considered above,) the Company, under the proviso to the 8th section, may have paid the amount of the commissioners' award and taken the land, previous to the jury trial. If they have, is a judgment to be entered against the Company, and execution issue against them for the whole amount found by the jury, or only for the excess of that amount over the award of the commissioners, which by the supposition has been paid, and costs? To construe the act altogether in view of the constitutional provision, it may be supposed that the Legislature intended, in such case, that judgment should be entered and execution issued for such excess. If the Company have not paid the award of the commissioners and taken the land before the jury trial, and the jury find a greater sum, was it contemplated that the Company could take the land without first paying, and leave the owner to the judgment and execution against the Company? The court would be slow to adopt such a construction of this clause of this section, in view of the proviso to the 6th section, and would rather say, and particularly as the succeeding clause in this same section leads, as we have seen, to a like result, that there also the meaning is, that judg-

ment shall be entered for the excess, leaving the proviso of the 6th section to operate upon and require the payment of the commissioners' award before taking the land. But even if, by the words of this clause, a judgment is to be entered against the Company for the whole sum found by the jury, when that sum exceeds the award of the commissioners, it does not necessarily follow that the Company can take the land without first paying. The court, I think, should hold that the parts of the act providing a mode for ascertaining the amount of compensation and damages are also subject to and governed by the general provision made in the 6th section, that the payment or tender of all damages for the occupancy of the lands be made before entering upon or breaking ground for the purpose of constructing the road. There are, certainly, views in reference to the constitutionality of the act, growing out of the 8th section, which are difficult. This section relates to proceedings beyond the award of the commissioners. If the act had stopped at the award of the commissioners, and made that final, and authorized the Company to take the land on the payment of the amount of that award, the charter would be simple and free from complication or difficulty of construction; and would be, as is admitted by the counsel for the complainant, constitutional. There is a propriety in not making that award final, and in providing for a trial by jury. It is from the provisions of the act providing for such trial, and the provisions authorizing the taking of the land before the trial is determined, (by paying, &c. as I have supposed,) that the difficulties arise. It seems to have been the general idea of the draftsman of the charter, and of the Legislature, that inasmuch as they might have stopped at the award of commissioners, and authorized the Company to take the land on paying the amount of the award, (that award being a fair and constitutional means of ascertaining the compensation and damages,) a provision beyond that, giving the owner a chance of getting the sum enlarged, and the Company a chance of getting it diminished, by the action of a jury, would not render the act unconstitutional. And I am disposed to think it would not, if the Company are, by the act, at all events to pay, either the award of

the commissioners or the amount found by the jury, before they can take the land. And I think that by the fair construction of the act they must do one or the other. If they want to take the land before a jury has passed upon the matter, they must pay or tender the amount of the award. If the amount is received by the owner, and the Company apply for a jury, whether they could recover back from the owner any excess they may have paid over the amount found by the jury, is a question in reference to which the act will be explained by the court to which such question may be (if ever) presented.

If the Company tender to the owner the amount of the award of the commissioners, and the owner refuses to receive it, and applies for a jury, and the Company, upon such tender and refusal, take the land, what is the position of things under this act. The Company have taken the lands upon making the tender of the amount of the award. The owner has not received the money. The Company have got the land, and the owner has not got the money. There is no provision in the act requiring the Company, in such case, to deposit the money tendered in some place where the owner may get it when he is willing to receive it. Does the act mean that such tender shall be equivalent to payment so far that if the owner applies for a jury he must rely upon a judgment and execution against the Company to get his money? It may be contended that if he would not accept the amount found by a fair and constitutional mode, under an act which provides for nothing but a judgment and execution, if he applies for a jury, he must be considered as preferring a judgment and execution for the larger sum he expects the jury to find, to the receiving, in hand, the amount awarded by the commissioners. But the jury may find a less sum; and in that case there is no clear provision in the act that the owner shall have judgment and execution. If, by construction, it is to be held that in either case the owner is to have judgment and execution for the amount found by the jury, deducting the costs in the latter case, then we stand yet on the other position, that he must be held to prefer a judgment and execution for the larger sum he expects the jury to find, to the amount of the award, in hand. It is not necessary now to consider this part of the act

more particularly. The injunction applied for was against any assessment being made by the commissioners. We have not, therefore, yet reached what may be the difficulties of the statute, upon the constitutional question. And I am disposed to think that upon this part of the case the questions, when they arise, will be such that this court will think it more discreet to leave them to the regular decision of the courts than to interpose by injunction.

It is, I believe, the first charter with like provisions and absence of provision, under the new constitution. It may have been carelessly drawn, or it may have been designedly drawn as it is, under the belief that it is a sufficient compliance with the provisions of the constitution, in the most objectionable construction that can be put upon it in reference to the constitutional question. It must be supposed that the Legislature thought it sufficiently complied with the constitution. The question is an interesting one in reference to future legislation and the interests of land owners ; and it is important that it should be presented to and acted upon by the courts in such way that it may receive the adjudication of our court of last resort, directly, disconnected with any such questions of discretion or jurisdiction in this court as, if it should reach the Court of Appeals on appeal from the action of this court in granting or denying an injunction might leave it not satisfactorily decided by a reversal or affirmance of the order of this court granting or denying the injunction. I am of opinion, therefore, upon this part of the case, that this court ought not to interpose by injunction.

The next question is, whether, under this act, commissioners ought to be appointed until the route of the whole road shall have been determined upon and a survey of such route deposited in the office of the Secretary of State. The company is incorporated by the name of "The Somerville and Easton Railroad Company," with a capital of \$1,200,000, with liberty to increase it to \$2,000,000 ; power is given to survey, lay out and construct a railroad from Somerville to Easton ; and the general course of the road is designated ; with a branch to Belvidere. The company may hold real estate at the commencement and termination of the road, at Somerville and the Delaware river, and at inter-

mediate depots upon the line of the said road, not exceeding five acres at each place. When the road is finished, the President and Treasurer of the Company shall file, under oath, a statement of the cost of the said road, including the amount of all purchases made by virtue of the act, in the Secretary's office; and, annually, a statement to the Legislature of the proceeds of the road, until the net income of the road shall amount to 6 per cent. upon the costs; and after that, the company shall pay the State a tax of one half of one per cent. on the cost of the road, annually; the company shall have power to borrow money to construct or repair the said road &c., and to secure the payment thereof by mortgage on the said road, lands, privileges and franchises of the corporation. After fifty years, the State may take the road by paying, &c., within one year after electing to take the said road; and it is made the duty of the President of the company to lay before the Legislature, under oath, when they shall so request, a statement of the cost of the road, and of all the receipts and disbursements of the company. If the said railroad shall not be completed and in use in seven years from June 4, 1847, the charter shall be void. The State shall have the right to subscribe \$25,000 of the stock of the company any time before or within twelve months after the said road or roads are completed; and the act is declared to be a public act.

From these provisions it is evident that the work contemplated by the act, and which it authorizes the company to construct, is a railroad from Somerville to Easton. We have no right to assume that the Legislature would have incorporated a company to construct a road from Somerville to any point short of Easton; and certainly no court, either of law or equity, would be willing, by any action in reference to any provision of this act, to sanction or give any countenance to the idea that the company may make a road to any intermediate point, and there stop, and enjoy the privileges of this act in reference to the part of the road so constructed. If this could be done, a tract of land might be purchased, situate a few miles beyond Somerville, by persons having the control of the stock of the company, and a road made to that point, stopping there, with a view to increase the value of those lands. We cannot suppose that the Legislature intended

that under this act the company could deprive Somerville of the advantage it now has, and give it to some point or place a little further in the interior; which would be the case unless the road goes to its western terminus, Easton. The road, by this act, is to be constructed to Easton, and the company cannot stop short of it; and before the road can be constructed, the route of it must, of course, be laid out and located.

This brings us to the question whether the company are at liberty, under the provisions of this act, to locate a part of the route, and to apply for commissioners of valuation and damages as to that part; or whether the whole route should not be located before commissioners for the valuation of any part be applied for.

The 6th section authorizes the company to lay out and construct a road from Somerville to Easton; and to enter upon all lands "for the purpose of exploring, surveying, leveling, or laying out the route or routes of such railroad, or lateral and branch roads, and of locating the same; and to do and erect all necessary works, buildings and appendages thereof, doing no unnecessary injury to private or other property; and when the route or routes of such road or lateral and branch roads shall have been determined upon, and a survey of such route or routes deposited in the office of the Secretary of State, then it shall be lawful for the company to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect embankments, bridges, ferries, and all other works necessary to lay rails, and do all other things suitable or necessary to the construction or repair of the said road or roads, subject to such compensation as is hereinafter provided; provided always, that the payment or tender of payment of all damages for the occupancy of lands through which the said road or roads may be laid out be made before the company shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said road or roads, unless the consent of the owner of the land be first had and obtained." It is difficult to understand that clause of this section which follows the authority to survey and lay out the route; that is to say, the clause "and to do and erect all necessary works, buildings and appendages

thereof, doing no unnecessary injury to private or other property." But nothing was claimed in argument from the force of these words, and could not be successfully ; for the whole section is governed by the proviso ; and that declares that before the company shall enter upon or break ground in the premises, except for the purpose of surveying and laying out the road, they shall pay or tender all damages for the occupancy of the land.

The provisions immediately applicable to the present question are, sec. 6, as follows : when the route or routes of such road or lateral and branch roads shall have been determined upon, and a survey of such route or routes deposited in the office of the Secretary of State, then it shall be lawful for the company to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect all works necessary to lay rails, and to do all other things suitable or necessary, &c., upon the payment or tender of all damages being first made.

And, sec. 7, as follows : when the company cannot agree with the owner or owners of such required lands, a particular description of the land *so required* for the use of the company, in the construction of the said road, shall be given in writing, &c., with the name and residence of the owner, to a Justice of the Supreme Court, who shall cause, &c. ; at which time he shall appoint commissioners to examine and appraise the *said* land ; and it shall be the duty of the commissioners to examine the *said* land, and make a just estimate of the value of the same, and assessment of damages as shall be paid by the company for *such* lands and damages aforesaid ; which report shall be made, &c., and shall be considered as plenary evidence of the right of the company to have, hold, &c., the said land.

What is the meaning of the terms "such required lands," "the land so required," and "the *said* land?" The charter could not mean that the company could present to a Justice of the Supreme Court a particular description of any land they pleased, or of any land they might merely think might be required (though it might afterwards turn out that such lands would not be required) for the construction of the road, and to have them assessed, that they might pay or tender, and get a title to them. The Legislature could not have intended to give the com-

pany any such latitude as this. A man is not to be compelled to sell his land for a price that others may put upon it, except in such case as the Legislature may enact to be a justifying necessity or reason for compelling him to do so ; and it is for the Legislature to provide that such justifying necessity or reason be made to appear by the party who is authorized to constrain such sale. Courts will look carefully into the language of an act of incorporation giving such authority, before they will conclude that the Legislature have provided no means in it for ascertaining the existence of such necessity or justifying reason. There is language in this act abundantly sufficient to show that the Legislature intended to require, and did require, that such necessity or reason should be made to appear, and did incorporate in the act a means or requirement for ascertaining the existence of such necessity or reason. They were the judges of what that means or requirement should be, and to adjudge such reason or necessity to exist upon any act or thing less cogent in proof of it than the Legislature have required, would be to invade the province of legislation. What, then, is the act in this respect ? It authorizes the company to lay out and construct a road from Somerville to Easton ; and to enter upon all lands for the purpose of laying out the route of such road, and of locating the same ; and provides that when the route shall have been determined upon, (that is, when the route or road is located,) and a survey of such route deposited, &c., it shall be lawful for the company to take and excavate any *such* lands, (that is, any lands upon the route of said road as located to *Easton*, not as located for a mile or ten miles,) and to do all other things suitable or necessary for the completion of the said road ; provided the payment, &c., for the occupancy of lands through which the *said* railroad (that is, the railroad to Easton,) may be laid out, be made, &c., unless the consent of the owner or owners of *such* lands be first had ; provided that the said road shall in no way impair the rights of the Camden and Amboy R. R. & T. Co., and Delaware and Raritan Canal Co., in the transportation of passengers or merchandise between Philadelphia and New York, &c. That, when

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the company cannot agree with the owner or owners of *such required lands*, a *particular* description of the *land so required* for the use of the company in the construction of the *said* road shall be given in writing, &c., to a Justice of the Supreme Court, who shall appoint commissioners to examine the said land, &c. I think it plain that the survey and location provided for by the 6th section is a survey and location of the whole road, or *the* route of the whole road, and that such survey is the mode prescribed by this act for ascertaining the lands which will be required by the company for the construction of the road; and that the phrases, in the 7th section, "*such required lands*," and "*the land so required* for the use of the company in the construction of the said road," refer to the lands which, by the mode prescribed in the 6th section, are found to be required.

A mere description of lands presented to the Justice of the Supreme Court does not show that the lands so described are required for the use of this company in the construction of the proposed road. The Justice wants the evidence that the lands described are required for the road; else why authorize an assessment of the value thereof, and enable the company to make a tender of the amount for the purpose of acquiring title thereto. And he must have the evidence required by the act; and the terms "*such required lands*," and "*the land so required*," in the 7th section, can have no other meaning than such lands as the survey and location of the route of the road, provided for in the 6th section, show to be required. That some evidence was necessary that the lands asked to be assessed are required, the company are aware. They have surveyed a strip of land about eight miles long, extending from Somerville to the White House road, and say that that is the location of part of the route of the road from Somerville to Easton, and that it runs over and occupies land which they now ask to be assessed; and they say that this partial survey of the route is sufficient evidence that these lands will be required for the construction of the road from Somerville to Easton, authorized by the charter. But the question is not, what is sufficient evidence to the mind of a Judge; it is, what evidence of it the Legislature have required. They might apprehend that it was impracticable to make a road to Easton,

and might be unwilling that a road should be made but part of the way. They certainly had the right to require what evidence they saw fit that *the* road, *inter terminos*, could be made; and is a survey of the route of *the* road which the company ask authority to make, too strong evidence of its practicability to be required by the Legislature? Their will cannot be gainsaid, nor will their wisdom in this respect, I apprehend, be impugned. There is but one survey and location mentioned, and that is a survey of the whole route. There is no provision for a survey and location of a mile or ten miles, and an appointment of commissioners as to that. What evidence does a survey and location of a mile or ten miles give of the practicability of constructing at all, or with the capital granted, the whole road? What reason can be given why the company should not be required to survey and locate *the* route of *the* road? Is there any impropriety, much less hardship, in requiring it? If they intend to make the road, it must be done; and it must be done before *the* road can be made. The only answer that can be given by the company is that if they are permitted to survey in parts, and get hands immediately to work on the parts surveyed, they can have the road finished sooner. But the only delay, even according to this answer, is their own delay in making a survey and location of the route; a delay which certainly the Legislature never contemplated to be sufficient to forbid the requirement of a survey and location of the whole route. If the delay which has occurred in making the survey and location, or which the company apprehend in making it, arises from the difficulty of the ground, the wisdom of the Legislature in requiring this evidence of the practicability of the work is the more manifest.

The idea of the company's complaining of a delay occasioned by their own omission to survey and locate the route of the road is somewhat amusing; and their asking to take lands without the evidence of the necessity therefor which the Legislature have required them to give, and which is at any time in their own power, is not less so.

It is said that sufficient has been done to make it evident that the lands of which they now ask an appraisement are re

quired. This may be so, or may not be so. But whether so or not, it is not the evidence which the Legislature required. The survey and location from Somerville to the White House may be evidence that a road can be made between those points, but is not evidence that a road can be made from Somerville to Easton; and if it cannot, then the company have no authority to take any lands whatever. The question involved is the same as if the company had surveyed and located a mile of route through a man's farm lying south of Clinton, and thereupon asked the appointment of commissioners to appraise it, without having located any other part of their route.

The survey of a mile so situated would not show that that mile was required for the road. It might appear, on a survey of the whole route from Somerville to Easton, that it was impracticable to carry the road south of Clinton, or so difficult that a route north of it should be taken.

Upon the best consideration I have been able to give the subject, I am strongly of opinion that both the letter and spirit of the act, and a just consideration of the rights of the landholder, and of the danger of judicial latitude in the construction of railroad charters, or of judicial dispensation with the requirements of such charters, require that the company should survey and locate their whole route before applying for commissioners to value any of the lands.

The next question is, whether this court ought to interpose by injunction. The injunction prayed for is, that the company may be restrained from having any assessment of the complainant's lands made; and from taking possession of, using or occupying, in any way, the lands of the complainant described in said pretended location. The latter part of the injunction prayed is disposed of by the view I have taken of the constitutional question. The company would not be enjoined from taking the land, if legally appraised, on the payment or tender of the amount of the commissioners' appraisal. The present inquiry, therefore, relates to the injunction prayed for. Is it the duty of the court to enjoin an assessment? The question of the right to have an assessment made before a survey and location of the whole route is made

and deposited is a strict legal question, belonging to the law courts, and should be left with them, unless some ground is laid on which this court should interpose its preventive action. The assertion of a right, the existence or non-existence of which is properly determinable at law, and the exercise of which will do no injury to the person denying it, does not seem to furnish a ground for injunction. If an assessment should be first made, and a survey and location afterwards made, occupying the same lands that had been assessed, this court would not enjoin the further proceedings of the company on the ground that the survey and location were not made before the assessment; but would leave the question whether the assessment could legally be made before the survey and location to the law courts, for the reason that no such injury could arise to the owner from changing the order of time in which these two things were done as would require the interposition of this court by injunction. The assessment itself could do no injury.

If, after the assessment shall be made, the company evince an intention to take the lands assessed without making a survey and location of the whole route, and covering the lands so assessed, so as to show that these lands are required for the road, and an injunction should be prayed, still it would be a question whether it would be a case for an injunction. If the charter gives no legal right to enter upon the land for the purpose of constructing the road until a survey and location of the whole route be made, such entry would be but a trespass. An injunction against a trespass is not granted except on the special ground of irreparable injury. In this case, the existence of any such special ground would be altogether uncertain. If the road shall be finally surveyed, located and constructed through to Easton, and the route of it shall cover the ground assessed, the complainant will have sustained no injury—that is to say, no injury which any court can redress; for it is the injury which the act authorizes the company to do him. The only injury he could complain of would be the taking his land before the whole route was surveyed and located; but that would be no such irreparable or serious injury as to induce an injunction.

This act contains a provision, that unless the road from Som-

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erville to Easton be completed and in use in seven years from June, 1847, the act shall be void. This give sufficient assurance that the whole road will be made within that time. And if it is to occupy, as part of it, the land of the complainant, which the court must regard as, at least, very probable, if the company pay for it and take it, then no such injury is impending over the complainant as calls for an injunction against an assessment.

The idea that, after finishing a part, the company may apply to the Legislature to allow them to use that part without finishing the whole, cannot have any influence in the present inquiry. The act requires the whole to be finished within a given time, under the penalty of forfeiting the charter. These are considerations which may fairly influence the discretion which this court exercises in reference to the use of the power of injunction. A court of law must pronounce upon the strict legal question involved. But the want of strict legal right to do an act will not always command the injunction of this court.

Injunction denied.

WM. GRAFTON and JOSEPH HOLLINGSWORTH vs. PHILIP
BRADY.

On a bill for a discovery in aid of a defense at law. an injunction was granted restraining further proceedings in the action at law. The defendant answered the bill, denying its allegations, and making no discovery. Injunction dissolved.

The case was submitted on bill and answer, without argument.

O. S. Halsted, Jun'r., for complainant.

J. Chetwood for defendant.

THE CHANCELLOR. This is a bill for discovery in aid of a defense in a suit at law, and praying an injunction restraining proceedings in that suit; which was granted. The defendant has answered, denying the allegations of the bill in reference to which a discovery was sought, and making no discovery. The injunction falls of course.

CITED in *Henwood v. Jarvis*, 12 C. E. Gr. 250.

THOMAS TOMLINSON and EDMUND DAVIS, JR., vs., CALEB SHEPPARD.

A bill was filed by one heir at law, against another heir at law, who was also administrator of the personal estate of the intestate, for the discovery of deeds; one, made by the intestate, in his life time, and his wife, the mother of the parties, of property belonging to the wife, to A. B.; the other, a deed from A. B. to the intestate, in his life time; neither of which had been recorded. The bill stated, that after the death of the intestate, the defendant had by fraud and circumvention procured a will to be made by the mother, giving the property to him; and prayed a discovery of the deeds; and also prayed the relief that the deeds might be established; and that the defendant be directed to account for the complainant's portion of the rents and profits. The answer discovered the deeds, but set up facts on which it claimed that they were inoperative; and denied that the will made by the mother was procured by fraud. On the pleadings and proofs it was ordered, that the bill be retained for twelve months, and the complainant be at liberty to bring ejectment; and that the defendant produce the deeds on the trial thereof; reserving all further directions.

On the 10th of June, 1847, Thomas Tomlinson, and Edmund Davis, Jr., an infant, by his next friend, Horace B. Davis, exhibited their bill, stating, that David Sheppard, late of Hopewell, in the county of Cumberland, died intestate, April 12th, 1846; and that his son, Caleb Sheppard, administered on his estate, and has in his hands, after paying all debts, a surplus of the personal estate. That Eleanor, the wife of the said David, at the time of her marriage with him, was seized of a farm, of about sixty acres, in Hopewell, in said county, (describing it,) said farm being now occupied by Wm. McPherson, as tenant of the said Caleb Sheppard.

That on or about March 1st, 1843, the said David Sheppard and his said wife, for the consideration of \$2000 expressed in said deed, and therein acknowledged to have been received, or some other sum, sold and conveyed the said farm to one John Ayres. That the deed was acknowledged by the said David and Eleanor, before Eli Ayres, a Commissioner, &c., whereby the said John Ayres became seized of the said farm in fee. That on or about the same day, the said John Ayres, by deed, for the consideration of \$2000 therein expressed and acknowledged to have been received, sold and conveyed the said farm to

the said David Sheppard, whereby he became seized thereof, in fee ; and the said David, thereupon, took possession of the said farm, and was, either in person or by his tenants, possessed thereof, in his own right, as owner in fee, until his death ; and also took possession of and retained until his death the said deeds to John Ayres and from John Ayres to him.

That after the making of the said deeds, and up to the time of his death, the said David considered himself as seized of the said farm, in fee, and often so declared ; and at several times wrote down the outlines of a will disposing of said farm, among other property, as his own ; and, in particular, the said David wrote the form or outline of such a will in one of his books, which book is now in the possession of the said Caleb Sheppard, administrator as aforesaid ; and he also procured Ellis Ayres to draw for him a will, or the outlines or form of a will, in which he disposed of the said farm as his own ; which, after the decease of the said David, was in the possession of or known to the said Caleb, and is now in his possession or under his control, unless he has destroyed or disposed of it.

That the said Caleb, before and after the decease of the said David, knew and was well aware of the execution of the said deeds ; and at the time of the appraisement of the personal property of the said David, he expressly stated and admitted, and at several other times has stated, that the said farm belonged wholly to the said David, in fee simple, and not to his widow, the said Eleanor, or words to that effect.

That the said Caleb, well knowing as aforesaid, and that, on the death of the said David, one third of the said farm descended to his sister, Martha B. Randolph, applied to her and purchased of her, for \$2200, her right and interest in and to the estate of her said father, real and personal, and obtained from her a deed or release therefor, dated on or about March 4th, 1846, the said farm being included in the said purchase, and the said price being more than her share of the real and personal estate would be worth unless she was entitled to one third of the said farm, and that said Caleb, after the said purchase, represented himself to be entitled to two thirds of said farm, subject to the dower of the said Eleanor, one third in his own right as one of the heirs of

said David, and one third by virtue of his said purchase from the said Martha; and he received the produce of the said farm accordingly.

That the said Caleb, after the death of the said David, and, as the complainants have reason to believe, after his said purchase from Martha, came, as the complainants believe and charge, into the possession of the said deeds to John Ayres and from him to the said David Sheppard, the same having never been recorded, and has since concealed or destroyed them.

That the said Caleb, having thus obtained the said deeds, or knowing that the complainants could not have access to them, prevailed upon the said Eleanor to make a will, which she did, upon his suggestion and procurement, as he had the same written or as he requested it should be written; and made on or about June 14th, 1846; by which will, after several small pecuniary legacies, she devises all the residue of her estate, whatsoever and wheresoever, whether real or personal, to the said Caleb, his heirs and assigns forever, and appoints him executor thereof; which will was admitted to probate, by the Surrogate of Cumberland, on or about April 27th, 1846, and was duly executed, as the complainants suppose, to pass real estate.

That since the probate of said will, the said Caleb claims the said farm as having been, at the execution thereof and at the death of the said Eleanor, the property of the said Eleanor, in fee simple, and as being devised to him by her said will; but the complainants charge, that the said farm was not, at the making of said will, or at the death of said Eleanor, the property of the said Eleanor; and that she reportedly declared, before and at or about the time of making said will, and afterwards, that deeds for the same had been made and acknowledged as herein before stated, and that she supposed they were on record, and that the said farm was not her's to dispose of, or words to that effect.

The complainants charge, that the said Eleanor did not intend to devise the said farm to the said Caleb, and did not believe when she executed said will that the effect of it would be to devise the same to the said Caleb. That the said Caleb, at the time of the making of the said will, and from that time till the death of the said Eleanor, concealed from her his knowledge that

the said deeds had not been recorded, though he knew, before the execution of said will, that they had not been recorded; and that he concealed from her his intention to claim the said farm as his exclusive property by virtue of her said will; and that he procured the said will to be made by fraud, circumvention and concealment.

That the said David and Eleanor had three children, Caleb, Martha B. Randolph, and Abigail who intermarried with one ——— Tomlinson; and the bill states the rights of the complainants as heirs at law.

The bill prays a discovery of the deeds; and that they may be established, and the contents and purport thereof ascertained by the decree of this Court; and that the said Caleb may be required to release and secure to each of the complainants, respectively, a good and sufficient title to the one undivided ninth part of the said farm; and that the possession thereof may be delivered to them, respectively; and that the said Caleb may account to them for their respective shares of the rents and profits thereof by him received since the decease of the said David Sheppard; and that the will of the said Eleanor Sheppard, so far as the same can or may affect or devise the said farm to the said Caleb, may be decreed to be fraudulent, void and inoperative; and for further relief.

The answer admits a surplus of personal estate in the hands of defendant, as administrator; that the said Eleanor, at the time of her marriage, was seized in fee simple of the farm; admits the deed from the said David and Eleanor to John Ayres; but says he is informed and believes, and is ready to prove, that no consideration passed at that time, or, as he is informed and believes, at any other time, between the parties thereto; admits that the said deed was duly acknowledged; that John Ayres, on the same day, conveyed the said property to David Sheppard, though he has been informed and believes that no consideration passed; and that this deed was duly acknowledged; that, after the said conveyance, the said David continued in possession of said farm as he had been in the possession thereof before; but denies that the said David acquired any title in fee simple to the farm by the said deed, because, at the execution thereof,

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it was stated by the parties thereto that the said conveyances by the said David and Eleanor to the said John Ayres and from the said John to the said David were made solely to enable said David to devise the same ; and that the said Eleanor did not, at that or any other time, receive any consideration for signing the said deed.

Admits that said David took possession of said deeds ; that he then considered himself the owner of said farm in fee simple ; and that, in writing down the outlines of a will, he did, among other property, devise the said farm as though it was his own ; that he has found, among the books and papers of the said David, the outlines of a will, in the handwriting of the said David, as he believes, in which he makes the following disposition of the said farm : " I give to my daughter Martha Randolph, during her natural life, all the place where I now live," being the farm in question, " and Stathem's neck marsh, and marsh over the creek ; and to Lewis Randolph during his natural life, and at the death of my wife and Martha and Lewis Randolph, to be sold by my executor, if living, or his executor or administrator, and the money that it fetches to be divided equally between my grandson T. Tomlinson and my four grand-daughters, A. R., A. S. R., Naomy D. S., E. G. S., if living at the time of the sale, and to their children if they have any." He admits that he found among the papers of the said David the outlines or form of a will, in the handwriting of Ellis Ayres, as he believes. Among devises of other property was the following of the said farm, that is to say : " I give to my daughter Martha Randolph, during her natural life, all my homestead farm, (being the farm in question,) including all my lands in Hopewell ; also my marsh in Greenwich township, in Stathem's neck, during her natural life. Also, in case of her death before her husband, Lewis Randolph, he to hold the same during his natural life, subject to the above bequest of \$25, annually."

He admits that the said two forms or outlines of wills came to his possession as administrator ; which said forms or outlines of wills were never executed ; but were left in an incomplete state, and are now in his custody or power, ready, &c.

He denies that he had any knowledge of the execution of

the said deeds from the said David and Eleanor to the said John Ayres, and from the said Ayres to the said David, before the death of the said David, or at the time of his death ; but he admits, that shortly after said David's death he came to the knowledge that these deeds had been executed, by information of the said Eleanor, who informed him that she had conveyed her said farm to her said husband, to enable him to dispose of the same by will in a satisfactory manner ; and, acting under the information thus obtained, he might have admitted and stated, at the time of the appraisement of the personal property, that the said farm belonged wholly to the estate of the said David, and not to the said Eleanor ; though he has not now any recollection of such admission or statement ; and he might have stated at sundry other times, shortly after his father's death, that the said farm belonged to his father in fee simple, and not to his mother, because he admits that he then so believed.

He admits he applied to and purchased from his sister Martha, for \$2,200, her right and interest in the estate of his father, as stated in the bill ; and that when he made the said purchase he believed that she was entitled, as heir at law, to one third of said farm ; and that said farm was included in the said purchase.

He says that, a few weeks after his father's death, and after he had taken out letters of administration, he found, among other papers belonging to the estate, the before-mentioned deeds ; which were lying loosely among his papers and had never been recorded ; that he took them into his possession, and that they are now in his custody, ready to be produced ; that he was advised that these deeds were inoperative and void ; and, when they were shown to the said Eleanor, she declared them to be void, as her husband had promised her that he would not record them until he had written his will in accordance with their mutual wishes and desires. And this defendant verily believes, that his father thought they were inoperative and void, and of no force and effect in passing the fee of the said real estate until they had been placed on record.

He says that, when his mother learned that the said deeds had not been recorded, she considered the said farm her own ;

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that she took the crop of oats growing on it, and sold it, or procured it to be sold, for her own benefit.

He admits that the said Eleanor survived the said David, and died on or about April 15th, 1847; but denies that she ever spoke of the said farm as belonging to the heirs of the said David after she discovered that the said deeds had not been put on record, though she may have so spoken before; and denies that she ever received any dower therein; but says she always claimed the said farm, after that time, as her own.

He admits that the said Eleanor made her will, dated June 14th, 1846, of the purport and effect stated in the bill; and that it was admitted to probate; but he denies that it was written or executed by his suggestion or procurement, or that it was written as he requested it should be written; nor did he prevail on the said Eleanor to make a will; nor procure others to prevail on her; but the said Eleanor was left, so far as he knows and believes, to the exercise of her own judgment and discretion in the making and executing of the said will.

He admits that, since the probate of the said will, he has claimed the said farm as having been, at the execution of the will of the said Eleanor and at her death, her property, in fee simple; and as having been devised to him by the said Eleanor; and he claims that the said farm was her property at the time of the making of her said will and at her death.

He denies that the said Eleanor, at any time, after she discovered that said deeds were not on record, ever admitted that the said farm was not her's to dispose of, and, especially, that she declared at the time of executing said will, or afterwards, that said farm was not hers to dispose of, or any words to that or the like effect. He declares that the said Eleanor did intend to devise the said farm to him by the said will; that she well knew the force and effect of the said will, and that the effect would be to devise the said farm to him.

He denies that, either at the execution of the will or at any other time, he concealed from the said Eleanor that the said deeds were not put on record; but, on the contrary, informed her that they were not on record. Nor did he at any time con-

deal from her his intention to claim the said farm as his exclusive property, by virtue of her said will.

He denies that he procured the said will to be made by fraud, circumvention or concealment ; but, on the contrary, did not interfere himself, nor procure any one to interfere with the free and uncontrolled exercise of the judgment and discretion of the said Eleanor in making and executing her said will.

He says he ought not to put the said deeds on record, because they were only executed to enable the said David Sheppard to devise the said farm, and said David did not devise it ; because no consideration was ever paid for the said farm ; and because the said David, himself, as this defendant has been informed and believes, never supposed that the said deeds had any force or effect in transferring the title to the lands mentioned therein, until the same were placed upon record.

The cause was heard on the pleadings and proofs.

L. Q. C. Elmer for the complainants.

THE CHANCELLOR made the following order :

It is ordered that the bill be retained for twelve months; and the complainant be at liberty to bring an ejectment for the premises in question, and proceed to trial thereon in the mean time. And it is furthered ordered, that the defendant produce on the trial thereof the deeds from David Sheppard and wife to John Ayres and from John Ayres to David Sheppard, bearing date Jan'y 26th, 1843, made exhibits in this cause ; and that the parties be at liberty to read the depositions taken in this cause of such of the witnesses as upon such trial shall be proved to be dead or unable to attend to be examined. And the Chancellor doth reserve the consideration of costs and of all further directions until after such trial shall be had ; and the parties are to be at liberty to apply to the Court as occasion shall require.

HUGH F. RANDOLPH vs. WM. GWYNNE and others.

A. bought of B. a mill seat, with a saw mill thereon, driven by water power, and paid part of the purchase money, and gave B. a mortgage on the premises for the residue of the purchase money. A. converted the buildings, by alterations and additions, into paper mills, putting in the machinery proper for that purpose, and a new water wheel; the mills being made complete as mills to be driven by the water power on the premises. It appearing, after several years, that in unusually dry seasons the water was not sufficient to drive the mills all the time, A. placed a steam engine in the cellar of one of the buildings, and applied the power of the engine directly to the driving wheel, so that the machinery of the mill moved precisely as if the wheel was turned by the water.

Held, that the engine did not become subject to the mortgage; but might be removed from the premises.

The facts of this case sufficiently appear in the opinion of the Court.

Motion to dissolve injunction.

F. T. Frelinghuysen for the motion.

C. Parker and *W. Pennington* contra. They cited *Smith's Leading Cases*, 160, 1, notes; 20 *Wend.* 636, 644; 13 *Law. Lib.* 15; 1 *Simon's Rep.* 194; 2 *Green's Ch.* 467, 9.

THE CHANCELLOR. In 1839, Hugh F. Randolph conveyed to William Gwynne a mill seat on Second River, in Essex County, and eight acres of land including the same, with two saw mills and other buildings thereon, for \$15,000; of which G. paid \$1500, and for the residue thereof gave R. a mortgage on the premises, payable in instalments; about \$6,000 of which is now payable.

G. converted the buildings, by alterations and additions, into a paper mill; putting in the machinery proper for that purpose, and a new water wheel; the mill being made complete as a mill to be driven by the water power on the premises.

Several seasons previous to that of 1845 were so unusually dry that the water was not sufficient to drive the mills all the time. G. therefore placed a steam engine in the basement or

cellar of one of the buildings, digging a hole in the ground, and laying a foundation of stone, brick and cement in the hole, large enough for the engine to rest upon ; bolts or rods of iron being fastened in this foundation, in proper positions, and projecting above the upper surface of it far enough to pass through holes in the bed plate of the engine, when placed upon it, and receive nuts to screw the engine down. The power of the engine was applied directly to the driving wheel, so that the machinery of the mill moved precisely as if the wheel was turned by the water ; and the engine was used only to supply power when the water was deficient. In 1848, and perhaps in 1847, there was no deficiency of water ; and G., in the winter of 1848, made a contract to sell the engine, and was about removing it.

R. filed a bill for the foreclosure of his mortgage, a part of the money secured by it being payable and unpaid ; and therein prayed an injunction restraining G. from removing the steam engine.

The injunction was granted by a Master, *ex parte*, and it is moved to dissolve it.

It is claimed on the part of the mortgagee that the engine, so placed, and for such purpose, became subject to the lien of his mortgage, and that G. has no right to remove it. I cannot think so. The mill is complete without it ; and except in dry seasons, it is useless. It has no such connection with any of the machinery of the mill proper, or with the building, but that it may be removed without injury to either ; and it is easily removable. I see no reason why such a machine or engine might not be hired by a mill owner for the exigency of a dry season, and placed upon the premises in any proper position, inside or outside of the mill, so as to apply its power to drive the machinery, until the rains should supply the water power in reference to which the mill was built ; and when the engine should be no longer wanted, it might be returned to the owner.

The injunction will be dissolved.

Order accordingly.

ARCHER GIFFORD, Adm'r &c. of ELIZABETH HAIT, vs. HERMAN THORN.

The issuing of a subpoena against a non-resident and taking an order for his appearance and publishing the order will not give the court jurisdiction, either over his person, or over the subject matter of the bill, if, from the nature of the case, the court has no jurisdiction over either.

If the case be such that the court cannot give relief for want of jurisdiction over either the person or the subject matter, the jurisdiction may be objected to in any stage of the proceedings; indeed, the court would take judicial notice of it; it would not make a decree which it had no power to enforce. It is otherwise where the objection to the jurisdiction is that there is a perfect remedy at law; such objection must be taken by demurrer or insisted on in the answer.

On a bill filed by the administrator of E. H., deceased, against H. T., a resident of New York, and the executor of J. R., deceased, who was, in his life time, executor of W. J., deceased, who lived and died in New York, and whose will was proved there, and whose estate was administered there; charging that H. T. came to the residence of E. H., in New Jersey, and fraudulently procured from her an assignment to him of her share of the estate of W. J., deceased, and that J. R., who lived and died in New Jersey, knew the circumstances under which that assignment was obtained, but, nevertheless, paid to H. T., in virtue of the said assignment, the share of E. H. in the said estate, and took a bond and mortgage from H. T. to save him harmless; and praying, that the said assignment may be ordered to be cancelled, and that H. T. and the executor of J. R. may be ordered to account, and to pay to the complainant the share of E. H. in the said estate; a subpoena was served on the executor of J. R. deceased; and a subpoena was issued directed to H. T., which was returned "not found," and the usual order for publication was made as to H. T. The court refused to vacate this order.

A bill was filed in the Court of Chancery of the State of New York, by some of the next of kin of Wm. Jauncey, deceased, complainants, in July, 1831, against John Ruthersfurd, executor of the will of said decedent, Herman Thorn and James A. Hamilton, making Elizabeth Hait, one of the next of kin of said decedent, also, a defendant.

Before any proofs were taken in that cause, an arrangement was made between the *complainants* in that suit and Herman Thorn, one of the defendants, by which the complainants, in consideration of \$210,000, to be paid to them by Herman Thorn, agreed to assign, set over and release to him all their shares in the estate of the said Wm. Jauncey, deceased.

Pending the negotiation which resulted in that arrange-

ment, and sometime in 1833, Elizabeth Hait executed an instrument to Herman Thorn purporting to be an assignment and release to him of her share in the estate of said Wm. Jauncey, deceased. When the said assignment from Elizabeth Hait was obtained, Herman Thorn also obtained from her an instrument authorizing him to substitute a solicitor for her in that suit, in the place of the solicitor she had employed, and authorizing such substituted solicitor to follow the directions of him, the said Herman Thorn. Thorn, accordingly, substituted another solicitor for the said Elizabeth.

The defendant Hamilton in that suit was the administrator of Wm. Jauncey Thorn, deceased, a son of Herman Thorn, and claimed that the fund of which the complainants in that suit claimed shares belonged to the estate of his intestate.

An arrangement was then made between the complainants in that suit and Rutherford, Herman Thorn and Jas. A. Hamilton, by which it was agreed that an order should be made in that suit by which Rutherford should pay the complainants therein \$210,000, and the said Hamilton, administrator as aforesaid, the remainder of the personal estate of Wm. Jauncey, deceased, and thereupon an order was

made, on motion of the counsel for Herman Thorn and Hamilton, the counsel for the complainants consenting, and the said substituted solicitor for Elizabeth Hait, by the direction of Thorn and on his behalf, consenting thereto, that Rutherford should pay \$210,000 as the consideration for the assignment by the said complainants to Herman Thorn of their share; and that it be referred to a master to state an account of all the personal estate of the said Wm. Jauncey, deceased; and that Rutherford should pay the balance of said estate, after deducting such payment, to Hamilton, as administrator of Wm. Jauncey Thorn, deceased. Under this order an account was taken; and Rutherford delivered over to Hamilton \$210,000; and, shortly afterwards, Hamilton delivered over this sum to Herman Thorn. A bill was then filed in the Court of Chancery of this State, by Archer Gifford, administrator &c. of Elizabeth Hait, deceased, against Mary Rutherford, executrix of the will of the said John Rutherford, and Herman Thorn, stating the foregoing

Gifford v. Thorn.

facts; and stating, further, that the said assignment and other instrument obtained by Herman Thorn from Elizabeth Hait were procured by fraud; that J. Rutherford, before the making of the said order made in the Court of Chancery of New York, well knew that the said Herman Thorn had no right to the said share of the said Elizabeth Hait; that he well knew all the circumstances attending the procuring of the said assignment by the said Herman Thorn from the said Elizabeth, and that the same was fraudulent against the said Elizabeth, and that he, the said J. R., would, if called upon by the said Elizabeth, be obliged to account for her share of the said estate; that the said J. R. so represented the case to the said Herman Thorn, and insisted that, before assenting to the said arrangement and the making of the said order, he the said J. R. should be indemnified against any claimant who should call him to an account touching the said estate or any share thereof.

That, in consideration of the said J. R.'s consenting to the said order, the said Herman Thorn, on the 6th of June, 1837, gave to the said John Rutherford a bond of indemnity, and a mortgage to secure the same, to save harmless and indemnify him from all claims or demands in law or equity, that the said Elizabeth Hait, or any other person, might make against him on account or by reason of his paying over to the said Hamilton the said moneys. And this bill submits, that J. R. thereby became personally responsible to the said Elizabeth for her share thereof, as, in violation of his trust as such executor, he entered into an agreement with said Thorn by which the said Elizabeth was defrauded of her claim against him, as executor, as aforesaid, for her share of the said moneys, and the same, with his knowledge and consent, and in violation of her rights, was, through the said Hamilton, as aforesaid, paid over to the said Herman Thorn. This bill states, that the complainant has no copy of the said bond of indemnity; and that the complainant is informed and believes, that it is now in the possession of the said Mary R., executrix, as aforesaid. And submits, that the complainant is entitled to a discovery from the said Mary of the contents thereof, and of all other papers in her possession relating to the said

arrangement by which the said share of the said Elizabeth was transferred by the said J. R., deceased, through Hamilton, to the said Herman Thorn; and that the said Mary, as such executrix, must, together with the said Herman Thorn, account with the complainant for the said share of the said Elizabeth Hait.

The bill states that Thorn alleges, that he paid the said Elizabeth \$6,000 for the said alleged assignment and release by the said Elizabeth to him; and charges that the share of the said Elizabeth was worth over \$200,000, as was well known to said Thorn.

It states that, for the reasons therein given, the said order in the suit in N. Y. gave no additional or further right than the said alleged assignment and release to receive or hold the said share of the said Elizabeth; and that the said Herman Thorn, and the said Mary R., executrix &c. of J. R., deceased, are bound to account for and pay over the same to the complainant, administrator &c., of said Elizabeth Hait, deceased.

The bill prays, that the said Herman Thorn, and Mary R., executrix &c., may answer the premises; and set forth what amount of said Jauncey's estate was received by the said Herman Thorn, when and from whom, and in what manner; and whether any and what consideration was paid by said Herman Thorn for the said alleged assignment by said Elizabeth Hait to him, and when the same was paid; and a copy of the said alleged assignment and release; and a copy of the said bond from the said Herman Thorn to the said J. R. That the said alleged assignment and release may be ordered to be delivered up to be cancelled; and that the said H. Thorn, and the said Mary R., executrix &c. of J. R., deceased, may be ordered to account for and pay to the complainant such portion of the said Jauncey estate as has come to the hands of said H. Thorn, with the consent of the said J. R., or otherwise, and to which the said Elizabeth Hait was entitled in her life time.

John Rutherford, the executor of the will of Wm. Jauncey, deceased, and who paid over the personal estate of Wm. Jauncey, deceased, to Hamilton, administrator &c. of Wm. Jauncey Thorn, who paid it over to Herman Thorn, lived in New Jersey when he was appointed executor, and continued to live in this State until his death, and died in this State, leav-

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ing a will, of which the defendant Mary R. is the executrix ; and the said Mary R. lives in this State. Herman Thorn, who obtained the said assignment and release from Elizabeth Hait of her share of the estate of Wm. Jauncey, deceased, and who received from the said Hamilton the said personal estate of Wm. Jauncey, deceased, lived, when he obtained such assignment and release, and still lives in N. Y. Wm. Jauncey lived and died in New York, and his will was proved there and his estate administered there.

A subpoena was served on Mary R. A subpoena was issued, directed to Herman Thorn, which has been returned "not found," with the usual affidavit of his non-residence in this State, and of his residence in N. Y. ; and thereupon the usual order for his appearance was made, and for the publication of the said order.

A motion was made to vacate this order.

Wm. Pennington and *P. D. Vroom* in support of the motion. They cited 5 *Cond. Ch.* 198 ; 1 *Stark. on Evid.* 275, notes ; 9 *Mass. Rep.* 462 ; 3 *Wheat.* 23 ; *Rev. Stat. of N. Y.* 71 ; 15 *Ves.* 164 ; 1 *Scho. and Lef.* 227 ; 2 *Ves.* 284.

B. Williamson and *A. Whitehead* contra. They cited 17 *Law Lib.* 45, 6 ; 15 *John. Rep.* 145 ; 1 *Stark. on Evid.* 276 ; *Calvert on Parties*, 25 ; 1 *Hopk.* 213.

THE CHANCELLOR. This bill sets out a case on which it claims that J. R., deceased, who lived and died in this State, and who had in his hands the personal estate of Wm. Jauncey, deceased, as the executor of his will, and who paid over to the administrator of Wm. Jauncey Thorn the said personal estate, including the share thereof which it is claimed belonged to Elizabeth Hait, became personally liable to the said Elizabeth Hait for her share of the said estate. The bill is filed against Mary Rutherford, the personal representative of J. R., deceased, as one of the defendants, and Herman Thorn the other defendant.

Wm. Jauncey, deceased, by his will, after certain devises and bequests therein, gave and bequeathed all the rest and residue of his property, of every kind and description, to Wm. Jauncey Thorn, when he arrives at the age of 21 years, to him and his heirs forever.

Wm. Jauncey Thorn died at the age of 19. The bill claims, that by his death before attaining 21, the said residuary devise and bequest to him lapsed, and that the said residue and remainder thereupon belonged to, and was distributable among the next of kin of the testator, Wm. Jauncey, deceased, of whom Elizabeth Hait was one.

Herman Thorn is the father of the said Wm. J. Thorn. The bill states that the said Herman Thorn claims that the said residuary legacy to his said son Wm. J. Thorn was a vested legacy; and that he the said Herman Thorn, as his father, on the death of his said son, became by law entitled to receive the same. A subpoena was issued, directed to H. Thorn, and on its being returned "not found," the usual order for his appearance was made, and for the publication.

The question whether this legacy was vested or whether it has lapsed lies at the foundation of this suit. It is a question in which Herman Thorn is interested. If it was a vested legacy, the foundation of E. Hait's claim is gone. It was proper, therefore, that Herman Thorn should be named as a defendant, and that a subpoena should issue to him; and if returned "not found," an order of publication made. He might desire to come in and put the defense in the suit on this ground; and might be willing to rest it on this ground. It is not till after this question in the cause is resolved in favor of Elizabeth Hait, that there is or will be any necessity of considering the questions raised by the bill in reference to the assignment and release from E. Hait to H. Thorn, and the action of J. R. thereon or in connection therewith. And if there was really no serious doubt that the legacy lapsed, but it was clear to H. Thorn that his only claim to E. Hait's share would be through the assignment and release from her to him, yet, inasmuch as he procured the assignment and release, and is therefore interested in preventing its being declared fraudulent, and more particularly from his having given, as alleged by the bill, a bond and mortgage to J. R. to indemnify him for paying it over to his son's administrator, from whom he would be entitled to receive it, there was no impropriety in naming him as a defendant, and issuing a subpoena and

taking an order of publication as to him. He is certainly interested in this question as well as in the other; and he might desire, or be willing, to put the defense, if the other ground of defense should fail him, on the validity of the assignment and release.

The order of publication, therefore, was properly made.

The motion is to vacate it. If the permitting the order to stand, or if proceeding in the cause as it now stands, and without any action on the part of H. Thorn, would commit him to the jurisdiction of this court, so as to enable this court to make a decree against him personally, the motion might prevail. But, if he is not subject to the jurisdiction of this court, and the subject matter which could be the foundation of any decree is not within the jurisdiction of this court, there is no propriety in vacating an order which was properly made. The issuing of a subpœna and taking an order for his appearance and publishing that order will not give this court jurisdiction, either over his person, or over the subject matter of the bill, if, from the nature of the case, the court has no jurisdiction over either.

So far as relates to the obtaining a decree against him personally, ordering him to pay the money he has received, no such decree can be made unless the court acquire jurisdiction over his person; and this order would not give such jurisdiction. As to the other part of the case, which goes against Mary Rutherford, and involves the validity of the assignment and release procured by Herman Thorn from Elizabeth Hait and the charges of knowledge, collusion, &c., in J. R., with a view to a decree against Mary R., executrix &c., H. Thorn is either a necessary party, from his having procured the assignment and his interest in establishing its validity, or he is not. That it was proper that he should be named as a defendant, to give him an opportunity of establishing the validity of the assignment and release, is, I think, clear. If he be a necessary party with the home defendant, for the purposes of a decree touching the validity or invalidity of the assignment and release, and J. R.'s knowledge, collusion, &c., then the subpœna and order of publication as against him were proper, for they would make him sufficiently a party for that purpose. Whether he is a necessary party with the home

defendant in this view of the case, I am not now called upon to say: his counsel will advise him as to this.

If the case be such that the court cannot give relief for want of jurisdiction over either the person or the subject matter, the jurisdiction may be objected to in any stage of the proceedings; indeed the court would take judicial notice of it, and refuse any decree; it would not make a decree which it had no power to enforce. It is otherwise where the objection to the jurisdiction is that there is a perfect remedy at law: such objection must be taken by demurrer or insisted on in the answer.

I see no reason for vacating the order of publication.

Motion denied.

CITED in Seymour v. Long Dock Co., 5 C. E. Gr. 407

SARAH M. BEGBIE vs. JOHN BEGBIE

On motion for alimony *pendente lite*, on bill by the wife for divorce from bed and board on the alleged ground of cruel treatment, and answer filed and affidavits taken on both sides, it is proper for the Court to look into the merits of the case as thus far disclosed.

The wife left her husband's house without his knowledge, and took the two children of the marriage with her ; and filed a bill for divorce from bed and board, on the alleged ground of cruel treatment ; and applied for alimony *pendente lite*. The bill showed no sufficient cause for her leaving the house at the time when she did leave it. The court refused alimony, and said it would not be allowed unless, on her going back, with the children, to the husband's house, and offering to take her place in the family he should refuse to receive her.

The case is sufficiently stated in the opinion of the court.

Motion for alimony, &c.

A. O. Boylan, in support of the motion, cited *Rev. Stat.* 924, sec. 8, 10 ; 1 *John. Ch.* 108, 604 ; 4 *Ib.* 189 ; 4 *Dess.* 33, 79 ; 1 *Green's Ch.* 459 ; 4 *Paige*, 516, 643 ; 2 *Ib.* 108 621 ; 1 *Edw.* 62, 317, 255 ; *Ib.* 62 ; 1 *John, Ch.* 364, 441 . *Saxt. Ch.* 383, 474 ; 2 *Hoff. Ch. Pr.* 245.

A. C. M. Pennington and *A. Whitehead*, contra, cite 1 2 *Paige*, 501 ; 9 *Dana*, 52 ; 3 *Edw.* 387 ; 3 *Green's Ch.* 172 ; 1 *Edw.* 278 ; 4 *Dess.* 94, 119 ; *Harper's Eq.* 144. ; 2 *Paige*, 454.

THE CHANCELLOR. The marriage took place in Feb. 1841. The complainant left the defendant's house in August, 1847. The bill was filed in September, 1847, and prays a divorce on the ground of cruel treatment.

The 8th section of the act concerning divorces enacts, that for extreme cruelty in either of the parties, the Court of Chancery may decree a divorce from bed and board forever thereafter, or for a limited time, as shall seem just and reasonable.

After the filing of the bill, notice was given of an application to be made on behalf of the complainant for alimony *pendente lite*, and for counsel fees for the prosecution of her suit.

After this notice was given, an answer was put in by the defendant, and affidavits were taken on both sides; and the bill, answer and affidavits were read on the hearing of the motion.

The complainant and the defendant had lived together for more than six years before the complainant left the house of defendant, and have two children; one a boy, now six years old; the other a girl, about four years old. The bill complains, generally, of ill usage, and of some particular instances of ill usage, without stating the times when they occurred. The complainant left the defendant's house in August, 1847, and took her two children with her. The bill shows no immediate cause for her leaving at that time; and she left, the answer says, without the knowledge of her husband. Nor does anything appear to show that she could not have remained safely, and free from personal injury. And even if she supposed that her own conduct was blameless, and that the defendant's treatment towards her had been such as to give her a ground for divorce from his bed and board, there is nothing to show that there was any necessity for leaving his house and taking the children with her in order to institute such a proceeding.

The great defect of the complainant's case on this application is, that the bill shows no sufficient cause for her leaving the house at the time when she did leave it, if she ever had at any time just cause for leaving it; of which no opinion is now expressed.

Even after a decree for a divorce from bed and board for a limited time, and for alimony, alimony will be suspended on the agreement of the husband to take the wife home, and treat her properly.

In cases of this nature, in which, as a general rule, it is contemplated that the separation that may be decreed will be for a limited period only, and that the parties may come together again, it is proper for the court to look into the case before it lends its aid to the prosecution of the suit, and thus widens the breach.

Ill treatment in months past can be no sufficient cause for the wife's leaving to-day. If she leaves her husband's house without just cause at the time of leaving it, she takes a wrong step, and she must retrace it before the court will oblige the husband to support her away from his house.

Begbie v. Begbie.

It will not be sufficient for her to send another to ask the husband if he will receive her. The only way she can retrace such a step is to go back herself, and if she took the children, to take them back with her.

In view of the case made by the bill, and of the answer and affidavits as to the temper and conduct of the wife, it would be a pernicious precedent to oblige the husband to furnish the means to prosecute her suit, and to support her away from his house during its progress. And the denial of the application will, I think, be more conducive to reconciliation and peace than any temporary separation that might be decreed by the court at the end of the suit.

No alimony will be allowed, nor counsel fees to prosecute the suit, until she takes the children and goes back to her husband's house and offers to return to her place in the family. If she does this, and he refuses to receive her into his house, she will be at liberty to renew her application.

Motion denied.

CITED in *Glasser v. Glasser*, 1 *Stern*. 22.

CASES ADJUDGED
IN
THE PREROGATIVE COURT
OF THE
STATE OF NEW JERSEY,

MARCH TERM, 1848.

OLIVER S. HALSTED, ORDINARY.

DANIEL RUNKLE, appellant, and ALFRED GALE, late Guardian of DANIEL RUNKLE, respondent. On appeal from the Orphans' Court of Warren.

A guardian's account, prepared by himself, was presented to the Surrogate on the day the ward came of age, and was by the Surrogate, without being particularly examined by him, (the guardian showing the receipt of the ward, who was present and said he believed the account to be right), reported to the Court and allowed by the Court. By a memorandum at the foot of the account it appeared that commissions, if they had not been paid by the ward, were waived by the guardian. It subsequently appeared that there were mistakes in the account, against the ward; one in the footing of a column, and the other in a miscalculation of interest. On the application of the ward, the Orphans' Court opened the account, on the showing of these mistakes apparent on the face of it, and directed a re-statement of the account, correcting these mistakes; and directed the allowance to the guardian, in the re-stated account, of the amount of the commissions which had thus been, if not paid by the ward, waived by the guardian; and directed the allowance of counsel fees to the guardian.

The Ordinary, on appeal, directed both these allowances to be struck out; and directed the Register of the Prerogative Court to re-state the account accordingly.

Daniel Runkle presented his petition of appeal, setting forth, that in the term of February, 1844, of the Orphans'

Runkle v. Gale.

Court of the county of Warren, the final account of Alfred Gale, his late guardian, was settled in the said court; that afterwards, at an Orphans' Court held for said county on the 11th of September, 1846, on the application of the petitioner, and the allegation of mistakes in the settlement of said account, it was ordered that the said Gale show cause on the 21st of October then next, why the said account should not be opened and re-settled; that on that day it was ordered by the said Orphan's Court that the said account be opened and re-settled, for the cause aforesaid; that afterwards, on the 3d of February, 1847, at a special term of said court, it was ordered and decreed that the said account be allowed, with the following additions and exceptions, (*prout* the same,) and that there was a balance due the said accountant of \$519.21; and did further order that the sum of \$75 be paid by this petitioner as a counsel fee to each of the counsel of said accountant, and that all other costs be paid by the petitioner; that he is advised that the said decree is erroneous, and he thereupon appeals to this court, and prays an order on the said Orphans' Court to return a transcript of the proceedings had before them touching the premises; and also an order that the said Gale may answer the appeal, at such time, &c.; and that the said decree may be reversed and that the petitioner may have such further relief, &c.

On the reading of this petition, an order was made, that the Judges of the said Orplans' Court do forthwith, on service of a copy of the order, make return, and send to this court the said account, and a transcript of the proceedings before them had touching the premises, and of the sentence or decree of the said court, and of all things had or done by them in relation to the re-settlement of the said account; and an order was also made, that the said Gale appear and answer the said appeal within 30 days after service of a copy of the petition and appeal and of the last mentioned order.

By an order of the said Orphan's Court, indorsed on a copy of the said order of this court, and signed by the Judges of said Orphans' Court, that court directed the Surrogate to make return to the order of this court, according to the exigency thereof. And the Surrogate returned to this court, un-

der his seal, a transcript of the proceedings of the said Orphans' Court touching the premises; among which is the first account of the accountant, with his oath annexed, "that the account is just and true in all things, both in the charge and and discharge thereof, according to the best of his memory and belief."

To this account is annexed the following note or memorandum :

"To the Judges of the Orphans' Court of the county of Warren: I, Daniel Runkle, above named, being now of full age, do acknowledge and certify that I have examined the annexed account, in the several items of the charge and discharge thereof, and pray the said Judges to allow the same as stated, I being satisfied of the correctness thereof.

DANIEL RUNKLE."

In the foregoing account, the amount which the accountant charges himself is	-	-	-	-	\$32,276 94
The amount of the items for which he prays allowance is	-	-	.	-	2,402 16
Leaving the balance in accountant's hands,					\$29,824 78

At the close of the account, and next preceding the oath, is this statement :

"Balance in accountant's hands, due said minor at this date, out of which the said minor now has paid the accountant his commissions, \$1,000, and the court charges on the settlement, \$5, he being now of full age ; so that said accountant's charges for commissions are satisfied in full."

At the special term of the said Orphans' Court, held in Feb'y, 1847, that court made the following order :

"DANIEL RUNKLE, exceptant, against ALFRED GALE, Guardian of DANIEL RUNKLE. On exceptions to final account opened for correction of errors.

"This matter coming on to be heard at this time, and the court having heard and considered the evidence and allegations of the parties, it is ordered and decreed that the ac-

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count of the said guardian, of which the above is a true copy, (this order being appended to a copy of the first account,) be allowed with the following additions and exceptions, viz. :

Error in interest, on the ward's side of the account,	
or \$15,028.73, received January 10, 1840,	625 05
Error in addition of disbursements,	199 99
	<hr/>
	\$825 04

And in the same order the said court allow the guardian commissions \$1,000 ; and find a balance due the guardian ; and allow the guardian's counsel \$150 ; and order the said balance and counsel fees to be paid by the ward, together with all the other costs to be taxed ; and order the Surrogate to state the account accordingly ; which he did.

The rule to show cause why the account should not be opened is as follows :

“ The said Daniel Runkle having applied for a re-settlement of the accounts of Alfred Gale, late guardian, &c., and alleged that there are mistakes therein, it is ordered that the said Gale show cause on the 21st of October next why the said accounts should not be opened and re-settled.”

On the 31st of March, 1847, Gale filed his answer to the appeal. The testimony taken before the Orphans' Court was reduced to writing, and was sent up to this court with the other proceedings.

There was exhibited before the Orphans' Court, on the part of the guardian, a writing signed and sealed by Daniel Runkle, witnessed by John M. Sherrerd, subscribing witness, dated February 28, 1844, by which Runkle says, that in consideration of a final settlement that day had and made by Alfred Gale, his late guardian, and of the sum of \$29,874.78 to him paid, he remises, releases and forever discharges the said Gale of and from all actions, suits, demands and claims whatsoever which against said Gale, as his guardian, he ever had, now has or can have. There is a certificate subjoined to it of the acknowledg-

ment of the said instrument by Runkle, before a Master in Chancery, also dated Feb. 28, 1844.

A Wurts and P. D. Vroom for the appellant. They cited 6 *Halst. Rep.* 44; 1 *Spencer's Rep.* 126; 4 *Harr. Rep.* 83; *Rev. Stat.* 214, sec. 27.

Sherrerd and W. Halsted for the respondent. They cited 3 *Dessau*, 93; 18 *Ves.* 383; 2 *Ves. Sen.* 566; 6 *Gill & John.* 424; 2 *Atk.* 112; 3 *Harr. Rep.* 266; *Ib.* 59. 67; *Rev. Stat.* 214, sec. 26; 2 *Smith's Ch.* 20, 21; 15 *Ves.* 72; 10 *Ib.* 562; 1 *Bro. Ch.* 140; 1 *John. Ch.* 48; 2 *Ib.* 14; 4 *Russell*, 180; 6 *Halst. Rep.* 44, 61; 1 *Ves. Sen.* 409; *Shep. Touch.* 320, 322, 334, 340, 343; *Bac. Ab. Release*; 6 *John. Ch.* 249; 1 *Hopk.* 334; 1 *Serg. & Rawle*, 317; 5 *Wend.*; 6 *Wend.* 620, 628, 632; 18 *Wend.* 350; *Hopk.* 408; 3 *Gill & John.* 311; 1 *Munford*, 119.

THE ORDINARY. The mistakes on account of which Runkle applied to the Orphans' Court to open the account were mistakes against him on the face of the account; one being a misfooting of a column, and the other a miscalculation of interest. It appears from the testimony that these mistakes were not discovered by Runkle until 1846, after the giving of the release from him to Gale. Gale did not set up the release in opposition to the application to the Orphans' Court to open the accounts; nor did he appeal from that order. When he was called on to correct these errors, he refused, and said the court should settle it; and he would charge commissions. It is not necessary, therefore, to inquire whether the release would have prevented the opening of the account. It appears from the testimony that Gale stated the first account himself; and the account, as stated by him, was passed by the court, without being particularly examined either by the Surrogate or the court; but the statement at the foot of the account in reference to commissions was appended at the suggestion of the Surrogate. This account was thus passed by the court on the day Runkle came of age.

The question is, were the Orphans' Court right, the accounts having been opened for the correction of such mis-

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takes, to allow commissions to the guardian on the re-statement of the accounts. I think not. If the guardian did not actually receive the \$1,000 commissions mentioned in the memorandum at the foot of the first account, it must be that he waived commissions. He cannot now, as an offset against errors in figures, in his favor, on the face of the account, recall that waiver and charge commissions. The surmise that he knew of these mistakes, and therefore waived commissions, would not relieve him, but would convict him of fraud.

It was said by counsel for the accountant that an allowance for commissions is not a subject of appeal. That question does not arise in this case. The subject of this appeal is, that the Orphans' Court, on re-stating an account which was opened for the correction of mistakes against the ward, in figures, apparent on the face of the account, allowed to the guardian commissions which, if he had not received on the settlement of the first account, he had then waived. The commissions will be struck out of the re-stated account. The counsel fees allowed to the guardian in the re-stated account will also be struck out. This will throw the balance of the account against the guardian; and the costs will follow the result.

The account will be ordered to be re-stated by the Register of this Court, in accordance with these views.

Order accordingly.

CITED in *Anderson v. Berry*, 2 *McCar.* 234.

CASES IN CHANCERY

JUNE TERM, 1848.

ROBERT LEWIS vs. JOHN H. HALL.

A deed of land was made to A. and B. in November, 1822, which was recorded in March, 1823. A. conveyed an undivided half of it to C., by deed dated Feb. 5, 1827, which was recorded Feb. 20, 1827. C. conveyed his undivided half to D., by deed dated April 27, 1833, which was not recorded until August 5, 1845. On the 23d May, 1840, deeds of partition were made between B. and D., which were both recorded on the same 23d of May, 1840. D. conveyed the half which had been set off to him in the partition to E., by deed dated March 14, 1842, which was recorded May 7, 1842; E. conveyed this half to F., by deed dated May 6, 1842, which was recorded May 7, 1842; and on the same day F. gave to E. a mortgage on this half, to secure a part of the purchase money, and also made a lease of it to E. until the first of April thereafter. F. died; and in April, 1843, the administrator of his estate, by order of the Orphans' Court, sold the half to G. and executed a deed to him, which was recorded Feb. 20, 1844. G. conveyed this half to H., by deed dated December 8, 1844, and recorded Nov. 7, 1845. In July, 1844, I. recovered a judgment against C.; and, shortly after, caused an execution to be issued on the judgment and levied on this half, and claimed that, inasmuch as the deed from C. to D. was not recorded at the time of the recovery of his judgment, the half thus held by H. was subject to the judgment and execution, by force of the statute of New Jersey, Rev. Stat. 643, sec. 18.

Held, that the same facts which would charge a purchaser from C. at the time of the entry of the judgment with constructive notice, would prevent the judgment's becoming a lien on the land thus held by H. That the said statute does not require actual notice; but that constructive notice is sufficient.

N. was a bona fide purchaser for a valuable consideration from M., by deed dated May 6, 1842, recorded May 7, 1842. M. was then in the actual possession and occupancy of the premises thus conveyed by him, a considerable portion of it being cleared, and he cultivating it as a farm. M. had received a deed for the premises on the 14th March, 1842, which was recorded May 7, 1842. In May, 1840, partition, by deeds, of a tract of land including the premises in dispute was made between S. and M.'s grantor, by which the premises in dispute had been set off, by metes and bounds, to M.'s grantor. These deeds of partition were recorded May 23, 1840. The testimony showed that the parts thus conveyed, by metes and bounds, by these deeds of partition, had been by agreement occupied separately be-

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fore these deeds of partition were made, according to the boundaries of the separate parts given by those deeds; and that S. and M's grantor had possessed and occupied, and exercised the usual acts of possession and ownership, notoriously, from April 27, 1833, on which last mentioned day. C. had conveyed an undivided half of the whole tract to M's grantor. This deed from C. to M's grantor was not recorded until August 5, 1845. *Held*, that these facts would charge a purchaser from C. in July, 1844, with constructive notice.

On the 27th of November, 1822, the executors of the will of Daniel Stuart, deceased, by virtue of a power in the will for that purpose, sold and conveyed to Jacob L. Struble and Peter L. Struble a tract of land in the township of Newton, county of Sussex, containing 246 56-100 acres. This deed was duly recorded on the 6th of March, 1823.

On the 5th of February, 1827, Jacob L. Struble and his wife, for the consideration of \$1,000, sold and conveyed to Uzal C. Haggerty the undivided half part of the said tract. This deed was recorded on the 20th of February, 1827.

On the 27th of April, 1833, Uzal C. Haggerty and his wife, in consideration of \$1,250, sold and conveyed to Jacob Morris, Peter Morris, Dennis Morris, Elizabeth Morris and Mary Morris his undivided half of the said tract. This deed was not recorded till August 5, 1845.

On the 23d of May, 1840, Peter L. Struble and the Morrisises made partition; 123 28-100 acres being conveyed by metes and bounds to Struble and the like quantity to the Morrisises. These partition deeds were both recorded May 23, 1840. They describe the tract divided, as the tract conveyed by the executors of Daniel Stuart to Jacob L. Struble and Peter Struble by deed dated November 27, 1822.

On the 14th of March, 1842, the Morrisises, by deeds, made partition among themselves of the said 123 28-100 acres which had thus been conveyed to them by metes and bounds, together with other lands which they owned as tenants in common; and in this partition this 123 28-100 was conveyed by the other Morrisises to Jacob Morris. This deed states that this 123 28-100 acres is a part of a tract containing 246 56-100 acres, conveyed by the executors of Daniel Stuart to Peter L. Struble and Jacob L. Struble by deed dated November 27, 1822. This deed was recorded May 7, 1842.

On the 6th of May, 1842, Jacob Morris and his wife, for the consideration of \$3,936, conveyed this 123 28-100 acres to John Northrup. This deed states that this tract is part of a tract of 246 56-100 acres conveyed by the executors of Daniel Stuart to Peter L. and Jacob L. Struble, by deed dated November 27, 1822. This deed was recorded May 7, 1842.

On the same 6th of May, 1842, Northrup and his wife executed a mortgage to Jacob Morris on the same tract of 123 28-100, to secure \$9,826 of the purchase money. This mortgage was recorded May 7, 1842.

On the same 6th of May, 1842, Northrup, by lease in writing under seal, stating that Jacob Morris had that day sold to him the said farm containing 123 acres, leased the same to the said Jacob Morris, in consideration of the interest on the purchase money for the said farm, until the 1st day of April thereafter; the said Jacob Morris to use the said farm in a farmer-like manner, and to commit no waste, and to have the privilege of harvesting the crop of winter grain he might sow upon the premises that fall.

After the death of John Northrup, Robert Lewis, the complainant in this suit, as administrator of J. Northrup, under an order of the Orphans' Court of Sussex county, made April 18, 1843, did, by deed dated February 20, 1844, sell and convey this tract of 123 28-100 acres, with other lands, to Arminda Northrup, the widow of J. Northrup, deceased, for the consideration of \$34.75. This deed states that this 123 28-100 acres is the same tract that was conveyed to the said J. Northrup, deceased, by Jacob Morris and his wife, by deed dated May 6, 1842, and recorded, &c., and is part of a tract of 246 56-100 acres conveyed by the executors of Daniel Stuart to Peter L. and Jacob L. Struble, by deed dated November 27, 1822. This deed was recorded February 20, 1844, the sale having been confirmed by the Orphans' Court on the 30th of January, 1844.

By deed dated December 8, 1844, acknowledged December 13, 1844, Arminda Northrup, who was a daughter of Robert Lewis, conveyed the lands so conveyed to her by the deed next before mentioned, to the said Robert Lewis, for the consideration therein expressed of \$500. This deed was recorded November 17, 1845.

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In July, 1844, John H. Hall, the defendant in this suit, recovered a judgment in the Circuit Court of Sussex county against Uzal C. Haggerty, on which judgment execution was issued, returnable the 3d Tuesday in August, 1844, indorsed "Levy the sum really due; debt \$1,027.13; costs of judgment, \$4; costs after judgment, \$1." (It was a judgment by confession, on bond and warrant of attorney to confess judgment.) This execution was levied on goods and chattels of Haggerty, and on a farm in the township of Frankford, of 90 acres, and on the undivided half of a house and lot where Hiram Dennis then lived, containing half an acre, and another lot in Frankford, containing about ten acres, subject to prior incumbrances.

Another execution was afterwards issued on this judgment against the goods and lands of Haggerty, tested the 4th Tuesday in May, 1845, returnable the first Tuesday in August, 1845; under which the Sheriff levied "on the undivided equal one half part of the tract or parcel of land, containing 246 56-100 acres, (describing it, and giving the boundaries thereof as given in the said deed from J. L. Struble and wife to Haggerty,) and stating it to be the same tract conveyed to Haggerty by Jacob L. Struble and wife by deed dated February 5, 1827. This execution was also levied on several other tracts of land, and on personal property of Haggerty.

This execution was levied on the undivided one half the said tract of 246 56-100 acres by the direction of John H. Hall. Under this execution the Sheriff advertised a sale of this property.

The bill states, that from and after the 27th of April, 1833, when Haggerty conveyed his undivided half to the Morrisises, the Morrisises, or some of them were in the actual possession and occupancy of the same; and that after the partition between Peter L. Struble and the Morrisises, the Morrisises, or some of them, were in actual possession up to March, 1842, when the one-half which they got in the partition was conveyed, in severalty, to Jacob Morris, and that he thereupon entered into the occupancy thereof, and was seized and possessed thereof until May 6, 1842, when he sold and conveyed it to J. Northrup; and that Northrup occupied and possessed it till his death, —————; and

that his administrator, under an order of the Orphans' Court, sold it, in December, 1843, to pay the debts of Northrup, to the widow of Northrup, who afterwards, in December, 1844, conveyed it to Robert Lewis, her father, who, as, administrator &c. of Northrup, had sold and conveyed it to her; Hall having, between the said administrator's sale and the conveyance by the said widow to Robert Lewis, to wit., on the 27th of June, 1844, obtained a judgment against Haggerty, by confession on bond and warrant of attorney to confess judgment.

The bill states the foregoing facts; and states, further, that at the time of the said levy under Hall's second execution, Robert Lewis, the complainant, was in the open and peaceable possession of the said 123 28-100, so divided by metes and bounds; and that he and those under whom he claims had occupied it for upwards of twelve years after it was so sold and conveyed by Haggerty; that Hall, when he directed the said levy to be made, well knew that the said land was not the property of Haggerty, but that the same had been sold and conveyed by him a number of years before; and that the persons to whom he sold, or those claiming under them, had, ever since the sale, been in the peaceable and undisturbed possession of the said property, claiming title thereto.

That, though the deed from Haggerty to the Morrisises was not recorded before the said levy; yet that Hall had actual knowledge of the same, as the complainant believes; and knew that Haggerty had not, for a number of years, owned or possessed the same; and that partition had been made of the said property, and that the same was held, and for some years had been held in severalty; that Hall, at the time of the filing of the bill, was, and had been since February, 1841, Clerk of Sussex county; and charges that, while such Clerk, Hall saw, examined and compared the before-mentioned deeds, which were recorded while he was such Clerk.

That Hall has directed the Sheriff to advertise and sell the undivided half so levied on as aforesaid; and that the Sheriff has advertised the same to be sold on the 13th of November, 1845, to satisfy the said judgment and execution. The bill

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prays an injunction until the further order of the court, restraining the sale, and a perpetual injunction.

The preliminary injunction was granted.

On the 23d of July, 1846, Hall filed his answer. He admits that the executors of Daniel Stuart, deceased, conveyed to Jacob L. and Peter L. Struble the land described in the bill, and that the same was recorded as mentioned in the bill; that the said Jacob and his wife conveyed to Haggerty an undivided half of said land, and that this deed was recorded as stated in the bill; and that Haggerty and his wife, about the time mentioned in the bill, sold and conveyed the said undivided half to the Morrisises, and that this deed was recorded as stated in the bill; but he says he has no actual knowledge nor information concerning the same, except from having seen the said deed in the Clerk's office, about the time it is stated in the bill to have been recorded, to wit., about August 5, 1845.

Admits that the Morrisises and P. L. Struble, about the time for that purpose mentioned in the bill, executed quit-claims to each other, as mentioned in the bill, and that the same were recorded as stated in the bill.

He says he is informed, and believes it to be true, that the said premises were not occupied, from and after the said conveyance by Haggerty to the Morrisises, in the manner and by the persons stated in the bill. On the contrary, he is informed and believes it to be true, that at the time of the conveyance of the undivided half by Jacob L. Struble to Haggerty, one Ahumy Bell resided upon the said premises in the bill mentioned as owned by the said Jacob and Peter Struble; and that the said Bell had resided there for many years previous, in a small dwelling house erected by him, and occupied the said premises or a small part thereof; and that after the death of the said A. Bell, his son, Jos. Bell, continued to occupy the said dwelling house and a small part of the said premises which had been cleared until five or six years ago; and that there was, during all that time, but a small clearing on the said premises, principally around the buildings, the residue of the premises consisting of timber and woodlands and barren bushes; and that he has been

informed and believes that it was understood and believed in the neighborhood that the said A. Bell and Jos. Bell occupied the said premises as tenants of Jacob L. and Peter L. Struble ; that he has also been informed and believes that after Jos. Bell left the said premises, Jacob Morris moved into the house upon the said premises which the said Jos. Bell had occupied, and remained there until he removed to Frankford ; but that this defendant has no actual knowledge of the same ; nor did he know, nor was he informed of the said occupancy by the said Jacob Morris at the time of obtaining his judgment against Haggerty, nor when the levy under his execution was made. That he has been informed and believes that the said Jacob Morris did, at the time for that purpose mentioned in the bill, make and execute some such deed of conveyance to John Northrup as is stated in the bill, and that the same was acknowledged and recorded in some such manner as is stated in the bill.

That he has been informed and believes that the said J. Northrup and Arminda his wife did, at the time for that purpose stated in the bill, execute some such mortgage to Jacob Morris, and that the same was acknowledged and recorded in some such manner as is stated in the bill.

That he has been informed and believes that the Orphans' Court of Sussex ordered the said administrator of J. Northrup, deceased, to sell his real estate to pay his debts ; and that the said administrator sold the said lands for the purpose mentioned in the bill to the said Arminda Northrup, the widow of the said J. Northrup, and the daughter of the complainant ; but that he has reason to believe, and so charges the truth to be, that the said sale and conveyance to the said Arminda were made under the direction of the complainant, and with the expectation and for the express purpose of being conveyed to the complainant.

He admits that he has been informed and believes that, about the time for that purpose stated in the bill, the said Arminda did make some such conveyance to the complainant as is stated in the bill, and that the same was acknowledged and recorded in some such manner as is therein stated. But he insists that such conveyance and sale was in pursuance of an understanding and ar-

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rangement made at the time of the sale by the complainant as such administrator, to the said Arminda.

He says that his said judgment against Haggerty was confessed to him for money justly and honestly due him from Haggerty on account of moneys which he had before then been compelled to pay for Haggerty as his surety in a certain bond. That at the time of the recovery of his said judgment against Haggerty, and when the levy was made on the said lands and premises in the bill mentioned, he had no knowledge or information that the said lands and premises had ever been in the possession of the said Jacob Morris, Peter Morris, Dennis Morris, Elizabeth Morris and Andrew Manning, or any of them; nor had he heard of their having occupied the same; nor did he know that the said lands had been in the actual occupancy or possession of the said J. Northrup, or Arminda Northrup, or the complainant, or any of them; nor had he heard of their occupying the same. Nor does he believe that the said tract of land was openly occupied by the said Jacob Morris, Peter Morris, Dennis Morris, Elizabeth Morris and her husband Andrew Manning, and Mary Morris, or any of them, during all the time from and after April 27, 1833, up to March 14, 1842, as stated in the bill. On the contrary, he has been informed and believes, and so charges the truth to be, that the greater part of the said premises consisted of timber and woodlands and barren bushes, except a small clearing on said premises around the house erected by A. Bell and occupied by him, and wherein he resided for many years and at the time of the conveyance of the said undivided half of the said tract of land and premises by Jacob L. Struble to Haggerty; and that, after the death of said A. Bell, his son Joseph Bell continued to reside on the said premises until the time when the said Jacob Morris moved upon the property and took possession of the same as stated in the bill; and that this was the only occupancy of the said premises which was apparent or known to the people living in the neighborhood, as this defendant has been informed and believes. And he has also been informed that, after the said Jacob Morris moved off the said premises, the house in which he had resided was left

empty, being old, and has become unfit for use ; nor has the same since been occupied by any person.

That he has been informed and believes that, after the said Jacob Morris left the said premises, the said J. Northrup occupied and cultivated some part thereof ; that he has been informed that, after the death of J. Northrup the said Robert Lewis (the complainant) occupied and cultivated some part of the said premises ; but that he has no knowledge or information as to any occupancy or possession of the said premises by the said Arminda Northrup, as stated in the bill.

That he has been informed and believes, and so charges the truth to be, that Haggerty, after his said purchase from Jacob L. Struble, never actually occupied the said premises ; but that, so far as any possession of the same was apparent, they were occupied by Peter L. Struble or his tenants long after the conveyance by Haggerty and wife was made ; and that the greater part of the said tract, being woodland, uninclosed, remained in the same situation after the purchase by Haggerty and after the sale by him ; so that no apparent change of possession took place, as it did not appear that there was any occupancy of the said premises, except the occupancy of A. Bell and Joseph Bell as before stated, until the said Jacob Morris entered into the possession of some part thereof.

That at the time when he obtained his said judgment against Haggerty there was not any such occupancy of the said premises as would be apparent ; nor was it known to him in whose possession or occupancy the said premises actually were.

He insists that, in searching for titles of land to or from Haggerty, there are no deeds which were recorded prior to the time when he obtained his judgment against Haggerty and when his said levy was made, which would necessarily and probably lead to the knowledge of the conveyance by Haggerty and wife to the Morrisises ; and he insists that he was not bound to look for deeds from other persons than Haggerty in order to obtain the knowledge of the conveyance of the said tract of land by Haggerty.

He says that, at and before the time when he recovered his said judgment against Haggerty, he had not discovered the said deeds and conveyances or mortgage set forth in the bill,

nor the records of the same in the Clerk's office of Sussex ; nor had he any knowledge of them, or any of them, according to his recollection and belief.

He denies that at and before the time when his said judgment was recovered he knew, or had been informed, that Haggerty had sold or conveyed to the said Jacob, Peter, Dennis, Elizabeth and Mary Morris the undivided half part of the aforesaid tract of 246 56-100 acres ; nor did he at or before the recovery of his said judgment know, nor has any recollection or belief of having heard of the several sales and conveyances as set forth in the bill as being made by Haggerty and wife and subsequently thereto of the said tract of land or any of them.

He says that at and before the recovery of his judgment against Haggerty he did not know, nor had he ever heard, that the said Jacob Morris, Peter Morris, Dennis Morris, Mary Morris, Andrew Manning, John Northrup and Arminda Northrup, or any of them, were in the possession of the said tract of land, claiming and reputed to be the owners thereof.

That at the time of the recovery of his said judgment he resided at Newton, Sussex county, and, as he supposes, about four miles from the said tract of land levied on as aforesaid ; but he has no knowledge of ever having been over the said tract of land until in the month of July 1845, and after the levy ; when, he believes, he was on a part of this tract ; nor does he believe that he ever passed over the said tract at any other time, unless the public road from Pleasant Valley to Myrtle Grove passes over the same ; but whether it does, he does not know ; nor did he, if he ever passed over the same, know whose land it was, or in whose possession it may have been.

That at the time of the recovery of his said judgment he did not know, nor had he heard, that the said Jacob Morris and his wife had conveyed to the said J. Northrup the said tract of land in the bill set forth, and more particularly described in the said deed from Jacob Morris and his wife to J. Northrup ; nor did he know nor had he heard of the said Northrup being in possession of said tract.

That he does not admit that he had heard that a man by the name of Morris had sold a tract of land to the said J. Northrup ;

but he expressly denies that he knew or that he had heard that it was the said tract so levied on as aforesaid, or that it was a tract which had been owned by Haggerty; nor did he hear or know what tract was so conveyed.

He says he commenced acting as Clerk of Sussex, February 15, 1841, and ceased February 14, 1846.

That while he acted as Clerk he generally assisted in comparing the deeds with the records; but he sometimes had other persons to compare them. But he has no recollection of having examined or compared with the records of deeds in said Clerk's office such of the deeds mentioned in the bill as were recorded while he was Clerk, or any of them. And if he did assist in comparing or examining the same, or any of them, he did so in the regular course of business, and not with any view of tracing titles; and the contents thereof made no impression on his mind or recollection. He admits that special directions were given by his attorney to the Sheriff to levy on the undivided half of the said tract of land, but insists that such directions were properly given; and that, as a judgment creditor of Haggerty, and without notice of any conveyance from him of the said lands and premises, he had a right to levy on and sell the said tract of land for the payment of his said debt.

He says that, inasmuch as the said deed from Haggerty and wife, dated April 27, 1833, and more particularly mentioned in the bill, at the time when he recovered his said judgment and when the levy upon the said property was made, had not been recorded according to law, and he at that time never having seen the said deed, nor having any notice of the said conveyance, he had no legal notice that the said property was not owned by Haggerty at the time of his said judgment and levy; and insists that, being a judgment creditor of Haggerty, the said conveyance not having been recorded when he obtained his said judgment, and he not having any notice of the said conveyance by Haggerty, the same was, by the statute, absolutely void and of no effect as against him.

Testimony was taken, and the cause was heard upon the pleadings and proofs.

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P. D. Vroom and *W. Halsted* for the complainant. They cited 1 *Gallison's Rep.* 41; 2 *Fonbl. Eq.* chap. 6, sec. 3, note M.; 1 *Chan. Cases*, 287; 2 *Vern.* 662; 1 *Atk.* 490; 6 *Wend.* 220, 226; 4 *N. Hampshire Rep.* 262, 266; 2 *Mass. Rep.* 508; 2 *Rand. Rep.* 93; 3 *Pick. Rep.* 140; 4 *Mass. Rep.* 637, 639, 640; 2 *Sugd. on Vendors*, 335, 7, 343; 2 *Ves. Junr.* 440, 437; 14 *Ib.* 433; 16 *Ib.* 249, 254; 2 *Scho. & Lef.* 583; 2 *Swanst.* 181; 1 *Meriv.* 282; 1 *Jac. & Walk.* 181; 2 *Green's Ch.* 154; 3 *Ib.* 492; 4 *Dana*, 258; 6 *Ib.* 59.

S. G. Potts and *Gov. Haines* for the defendant. They cited *Rev. Stat.* 643, sec. 18; *Patterson's Stat.* 399; 2 *Sumner's Rep.* 491, 551; *Sugd. on Vend.* (old edit.) 532, 535, 542; 2 *Scho. & Lef.* 327; 1 *John. Ch.* 574; 3 *Atk.* 654; 2 *Ib.* 275; 12 *John. Rep.* 452, 3; 2 *Ib.* 130, 182; 8 *Ib.* 137, 9; 1 *Story's Eq.*, sec. 399, and note, sec. 400; 2 *Sugd. on Vendors*, 339; 2 *Myln. & K.* 629, 632, 3; 14 *Serg. & Rawle*, 333; 1 *Wash. Rep.* 4; 8 *Cowen*, 260; 10 *John. Rep.* 457; 3 *Ves.* 478; 2 *Atk.* 275; 3 *Sugd.* 451, 3, 473; 2 *Pow. on Mort.* 577, note Y.; 13 *Ves.* 122; 8 *John.* 141; 18 *Ib.* 555; 1 *Ves. Jun.* 425; 1 *Scho. & Lef.* 327, 337; 3 *Mod.* 33, 274; 19 *Ves.* 440; 14 *Mass. Rep.* 269, 303.

THE CHANCELLOR. It was said in argument, on the part of the defendant, that, from the manner in which the complainant got the title in him, he had no equity calling for his protection against the judgment of the defendant.

The question whether the sale by him, as administrator of *J. Northrup*, deceased, and the subsequent conveyance of the property to him by the purchaser at that sale, were good as between him and those interested in the estate of *Northrup*, is not before us in this cause. For the purposes of this cause, the complainant stands in the place of *J. Northrup*, and holds the same position as if the questions involved in this cause were presented in a proceeding in this court between *J. Northrup* and *J. H. Hall* as a judgment creditor of *Uzal C. Haggerty*.

As between them the case stands thus: *Northrup* was a bona

fide purchaser for a valuable consideration on the 6th of May, 1842, by deed recorded May 7, 1842, from Jacob Morris. Jacob Morris was then in the actual possession and occupancy of the property, a considerable portion of it being cleared, and he cultivating it as a farm. The partition deeds between the Morrisises, by which this property was set off in severalty to Jacob Morris, had before been made, and were recorded the same day the deed from Jacob Morris to Northrup was recorded. On the 23d of May, 1840, partition was made between Peter L. Struble and the Morrisises, by which this 123 28-100 acres was set off in severalty to the Morrisises; and these partition deeds were recorded May 23d, 1840. The testimony shows that the parts conveyed by metes and bounds by these deeds of partition between Peter L. Struble and the Morrisises, had been, by agreement, occupied separately before these deeds were made, according to the boundaries of the separate parts given by these deeds; and that Peter L. Struble and the Morrisises had possessed and occupied and exercised the usual acts of possession and ownership, notoriously, from April, 1833, the time when Haggerty conveyed to the Morrisises his undivided half of the property, *i. e.* of the whole tract of 246 56-100 acres. Here was a notorious possession under title, from April, 1833, to May, 1842, when Northrup bought; and he bought of a man in the actual possession and occupancy under the same title; and the partition deeds between Peter L. Struble and the Morrisises were on record, recorded May 23, 1840.

Under the circumstances under which Northrup purchased, it cannot be doubted that he would hold against a purchaser under the Haggerty title on the day on which Hall's judgment against Haggerty was entered. Such a purchaser would clearly have been chargeable with notice.

The 18th section of the "Act respecting conveyances" provides, that every deed for lands to any purchaser of the same, made since January 1, 1821, shall be void and of no effect against a subsequent judgment creditor or bona fide purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such deed shall be recorded within fifteen days after the time of signing, sealing and delivering the same.

If this section is to be read so as to exclude constructive notice, then, if a deed is made to-day by A. to B., and recorded 16 days hence, of property of which B. goes into possession, and which he occupies for years and then sells to C., and of which C. goes into possession, and which he occupies for years and then sells to D., all which intermediate deeds are duly recorded, and then E., twelve, fifteen or nineteen years after the deed from A. to B., recovers a judgment against A., the deed from A. to B. is void as against such judgment creditor, unless, before his judgment was entered, he had actual notice of the deed from A. to B. I apprehend that such a reading of this section cannot be sustained.

The section was not intended to exclude the idea that such a state of facts might arise, by sale by the purchaser from A., and by his grantee to another, and so on through several conveyances, through a long course of years, the actual possession accompanying the several titles, and all the intermediate deeds duly recorded, as will charge a creditor obtaining a judgment against A. after all this, and for a debt that may have accrued but yesterday, with constructive notice of the deed from A. to B.

Another view of the statute might be taken. It provides that every deed from a grantor against whom a judgment shall be subsequently recovered, shall be void, &c. It does not say that a deed from such grantor's grantee to a bona fide purchaser from such grantee, duly recorded, shall be void against a subsequent judgment creditor of the first grantor. It leaves untouched the doctrine that, though a deed from A. to B. may be void as against a subsequent judgment creditor of A., yet a deed from B. to C., a bona fide purchaser from B., may be good against such subsequent judgment creditor of A.

I am of opinion that a judgment creditor stands on no better ground under this statute than a purchaser; and that what would charge a subsequent purchaser with constructive notice will charge a subsequent judgment creditor with the notice contemplated by this statute. And I am of opinion, further, that the facts in this case would be sufficient to charge a subsequent purchaser

chaser, buying at the time the defendant's judgment was entered, with constructive notice.

In reference to the answer in this case, I do not think it comes up to a full denial of actual notice.

Decree for complainant.

ELIJAH G. CATTEL vs. WILLIAM H. NELSON.

On a notice of a motion to dissolve an injunction given before answer filed, an answer filed after the notice, though it be filed ten days before the day fixed by the notice for the hearing of the motion, cannot be read in support of the motion.

On the 17th April, 1848, Elijah G. Cattel filed a bill against William H. Nelson, and obtained an injunction. On 21st of April, 1848, no answer being then filed a notice was given, on the part of the deft., of a motion to be made on the 3d of May, 1848, to dissolve the injunction. On the 1st of May, 1848, an answer was put in.

On the 3d of May, the day for which the motion to dissolve was noticed, the counsel of the respective parties appeared before the court.

R. P. Thompson, of counsel for the defendant, offered to read the answer in support of the motion to dissolve.

J. Wilson, for the complainant, objected, and referred to *Rev. Stat.* 908, sec. 16.

The Chancellor said the answer could not be read.

Mr. Thompson then moved, that the argument of the motion be postponed to some day, to be fixed by the court, beyond ten days from the filing of the answer.

The Chancellor said there must be a new notice. That when a party receives a notice of a motion to dissolve, he has a right to expect that the motion will be grounded on the case as it exists at the time of the notice.

JACOB RIDGEWAY *vs.* RICHARD S. LUDLAM.

If an agent for the performance of certain services for which a salary or yearly sum is to be allowed him, neglect to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal in which considerable amounts of money previously received by him are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omission occurred should be disallowed.

The bill states that in the year 1822, Jacob Ridgeway, the complainant, was the owner of several large tracts of land in the County of Cape May, principally wood-land, and on which was growing a large quantity of timber, and trees calculated for making cord wood, saw stuff, and other lumber; having also, thereon two saw-mills; one tract, called the East Creek Tract, containing upwards of 5000 acres; another, called the David Johnson Tract, containing about 700 acres; and three others, near Goshen, called the Green and Beaver Dam Tracts, containing about 600 acres. That in the year 1822, he agreed with Richard S. Ludlam, the defendant, and appointed him his agent and bailiff, and placed the said lands, saw-mills and appurtenances in his care and charge, to preserve the same from the trespasses of others, and from time to time, as directions should be given by him, the complainant, to cut the timber on said tracts into cord wood and lumber, and send the wood and lumber to him, or elsewhere, as he should direct. That the said Ludlam, being engaged in storekeeping, and residing near the East Creek Tract, and as he could pay for the cutting and carting the wood and lumber out of his store, and receive the cash from the complainant, and thereby make a profitable business for himself, accepted the said agency and charge, for the purposes aforesaid; for which services the complainant agreed to allow him \$150 a year, and pay him for the wood cut on the tracts near Goshen; and placed upon the landing, \$1,50 per cord; and for the oak wood cut on the East Creek Tract and carted to the landing \$2

per cord ; and for the pine wood \$1,75 per cord ; and \$5,92 per 1000 feet for the boards, scantling, and other sawed lumber, when put upon the landing.

That accordingly, in the year 1822, Ludlam took the charge and care of the said lands, saw-mills and appurtenances, as the complainant's agent, upon the said terms, and so continued until May 1839 ; during which time he cut and caused to be cut, annually, great quantities of cord wood, ship timber, boards, scantling, hoop poles, and other kinds of lumber, part whereof was sent and delivered to the complainant, part sold by Ludlam to other persons and the price thereof paid to Ludlam ; and that Ludlam also received from sundry persons divers sums of money for sawing done for them at the said mills ; and also sawed at the said mills large quantities of lumber belonging to him, Ludlam, for the sawing of which he should have accounted to the complainant ; and also cut and appropriated to his own use ship timber and other lumber upon the said tracts.

That Ludlam, annually, from the time he accepted the said agency to Feb. 1839, and about the month of January in each year, exhibited to the complainant an account of the wood and lumber cut upon the said tracts, but which the complainant has recently discovered are not correct, and do not contain an account of all the wood and lumber cut and sold from the said tracts, and of the sawing done at the said mills, and money received by Ludlam ; and, especially, that the accounts since the year 1833 contain but a small part of the wood and lumber cut and sold since that period, and which was not discovered by the complainant until about the middle of May 1839, when the complainant ascertained that large quantities of wood and lumber, without the directions of the complainant, had been cut and sold by Ludlam, and for which he had received the money and not rendered any account thereof to the complainant ; and that a large quantity had been cut and unaccounted for that remained unsold.

That, on such discovery, the complainant called on Ludlam for a further and full account of his said agency ; and, after repeated applications, Ludlam, in Dec. 1839, furnished an additional account of wood and lumber sold by him in 1837, 1838

and 1839, whereby it appears that 1367 cords of oak wood, 2538 cords of pine wood, not before accounted for, had been sold by him, at a price far below its value, and the money received therefor during the said years; all of which was cut without the order, direction or knowledge of the complainant; and after deducting all expenses, leaving a balance due the complainant of \$3,105 81; but no account is given of any other kind of lumber except a few hoop poles; and no account is given of the whole amount of wood and other lumber cut upon the said premises during his agency, and particularly since 1833, which the complainant particularly requested; and, upon being called upon for further and full accounts of all wood and other lumber cut during his agency, and especially since 1833, Ludlam positively refuses to give any other account, alleging the accounts already furnished to be full and true accounts; whereas the complainant charges that the accounts rendered do not show or pretend to show the amount of wood and lumber cut, but contain many errors. That the said accounts show but about 15,000 cords; whereas the complainant has been informed and believes and charges that the defendant has cut, during his said agency, more than 25,000 cords of wood, besides a large quantity of ship timber, boards, plank, scantling, cedar rails, hoop poles, and other lumber.

The bill prays an account of all the cord wood, ship timber, hoop poles, lath, boards, scantling, rails and other lumber, annually got or cut, by the defendant during his agency, designating the quantity of each kind of wood and lumber, and showing how he has disposed of it; and an account of the wood, trees, scantling, ship timber and other lumber cut by him and appropriated to his own use, and the value thereof; and an account of the quantity of lumber sawed at the mills, during his agency, out of his own timber, and what amount was sawed for other persons, and what amount was received by him; and an account of all moneys received by him during his agency; and that Ludlam may be decreed to pay what, upon taking the said accounts, shall be found to be due the complainant.

The defendant answered the bill, Feb. 24th, 1841, admitting his agency of the said lands and saw-mills; stating that there

was no specific agreement as to the price he was to have for cutting ; that he was to have the market price for cutting and carting.

He says he had directions from complainant to make sale of all wood, timber, lumber and materials upon the premises ; and that he has rendered a fair and honest account of all the wood, lumber and property sold by him, from year to year, by crediting the amount and value thereof in his, the defendant's books ; and has rendered the same account to the complainant at the close of every year. That he has no account of the amount of his own timber sawed at complainant's mills during his agency. That his timber was taken to the mills and sawed in the same way as that of others who had sawing done there ; and he took the sawyer's account of all sawing done at the mills ; which account included the work done for all persons who took timber there as well as the sawing done for him ; and the whole was regularly accounted for with the complainant. That he cut a portion of ship timber for his own use, for which he rendered an account, but cannot state the precise amount now. He sold the frame for a sloop for about \$100, which has been accounted for, and which he had a right to sell under his general instructions as agent of complainant.

That the manner of transacting the business precludes, and has at all times prevented him from rendering any specific account of the amount of lumber, wood, hoop poles and materials cut, sawed and done for the complainant, other than the account furnished by the complainant himself. That the wood was cut and sent to the complainant in Philadelphia, and he received the corder's bills and account of the quantity delivered ; which bills specified the description, quality and number of cords ; this was the only means of ascertaining the quantity ; and the complainant and he settled by the bills of the corders, and in no other way, as the books and accounts kept by the complainant will show. The practice was for the complainant to acknowledge the delivery of the wood in Philadelphia ; the number of cords of each description was then charged to him. The same mode of proceeding was pursued in regard to the lumber, hoop poles, and whatever property was sent as the letters, re-

ceipts and papers of the complainant will show. At the close of the year these vouchers were produced, compared with the complainant's books, and the transactions of the year settled, as far as they could be, leaving a large quantity of wood and lumber on hand. That in the years 1837-8 he, having other engagements, turned over his agency to William Townsend, a highly respectable and trustworthy person. That he informed the complainant of the employment of Townsend, and the complainant sanctioned the agency of Townsend by giving him directions from time to time, and receiving from him wood, lumber and property in the same manner as he transacted the business with the defendant; and it was during this time that the discrepancy appears in the accounts. A large amount of wood had been cut by Townsend and not sent forward to the complainant; and when the defendant was called upon to examine the wood he estimated the quantity as near as he could, and obtained an account from Townsend which he sent to the complainant; and this defendant had no other way of rendering the said account. He says that all the accounts he has rendered to the complainant, both in the debt and credit, are just and true accounts and he cannot render any other. That all accounts were settled up to the year 1834. They were compared with the books of the complainant and with the vouchers of the defendant; and were, as he supposed, finally closed up and settled to the entire satisfaction of all parties. After the lapse of so long a time it is impossible for him to render the accounts without the aid of the complainant's books. And although he is willing to come to an account with the complainant from the beginning of his agency if the court shall so direct, yet he insists he is not bound to render an account of his agency prior to such settlement when many of the vouchers and memoranda upon which such settlement was amicably made may be lost or destroyed, unless the complainant can show some error or fraud in the said settlement; nor has he the power to render any account other than such as have already been submitted to the complainant and which have been derived from his books as before stated. That he has annexed to this answer a general account made up from such materials as are in his power at the present time, and which has been

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derived originally from the books, papers, vouchers and memoranda.

He says there is a quantity of wood still upon the premises, cut under the direction of and paid for by this defendant, and which he claims a right to charge against the complainant when the quantity shall be ascertained in the usual way. He also claims to be allowed for bad debts for property sold, for sawing, and for lumber sold, in the course of his agency, which debts are lost without any fault or neglect of his. He says he is ready and hereby submits to account with the complainant under the order of the court, when all the accounts of the complainant and this defendant can be settled upon the producing before the proper officer the books, vouchers and papers, as well of this defendant as of the complainant.

A replication was filed.

On the 14th of October, 1841, an order was made referring it to Richard W. Howell, a master, to take an account of all the dealings and transactions between the complainant and the defendant, and of all the wood, timber, rails, poles and lumber of every description, got, cut or sawed by the defendant or by his directions, on the said premises, and of his disposition thereof and his disbursements respecting the same, making to each party all just allowances; and that for the better taking of the said account the said parties be examined upon interrogatories before the master, and produce all books and papers in their custody or power, relating thereto, upon oath or affirmation before the master as he shall direct; and that the parties be at liberty to apply to the court as occasion shall require, and that all further equities between the parties be reserved.

The parties were both examined before the master upon interrogatories, and witnesses were also examined before the master.

The Master made a report, stating the account between the parties, allowing to the defendant the stipulated yearly sum of \$150—up to and including the year 1839, and charging the de-

fendant with such receipts as he thought there was sufficient evidence to charge him with.

The report was excepted to on the part of the complainant, on two grounds. First, that in view of the facts appearing in the case, showing unfaithfulness in the defendant in his said agency, no allowance should have been made to the defendant on account of such stipulated yearly sum as compensation for his agency. Second, that under the proofs in the case the Master should have made a general charge of damages against the defendant beyond the charges made against him in the report for wood and timber cut and sold and not accounted for.

R. P. Thompson and *J. Q. C. Elmer* in support of the exceptions.

Jeffers contra.

THE CHANCELLOR. If an agent for the performance of certain services for which a salary or yearly sum is to be allowed him, neglect to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal in which considerable amounts of money previously received by him are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omissions occurred should be disallowed.

Perhaps the order of reference should have directed the Master to inquire as to the faithfulness of the defendant as agent, and whether he was entitled to the salary or yearly sum or not. But that question might yet be referred. I think that the Master, on the same ground on which he disallowed the yearly compensation for 1839, should have disallowed it also for the years 1837 and 1838.

The other exception to the report is in this general form: that the Master did not charge the defendant \$25,000 or some other large sum for spoliation and waste of property committed by the defendant during his agency. The reference to the Master was to take the accounts. The Master has

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charged to the agent all receipts by him of which sufficient evidence was given. A general claim for damages, founded on a probability or even something stronger, that more wood must have been cut, without sufficient proof thereof to enable the Master to charge for it would not authorize a charge on the account.

The first exception is sustained.

ISAAC ROWE and JACOB ROWE *vs.* JOHN B. MATTESON and DAVID HILL, Administrators, with the Will of BETSEY HOAGLAND, deceased, annexed, and KITTY WEART.

On a bill of interpleader the first decree is that the defendants interplead, and the case then becomes a case between the defendants as between a complainant and defendant.

A. gave a bond to B. B. died leaving a will and appointing executors; on the death of B., C. took possession of the bond, claiming that B., in her lifetime, had by parol transferred it to her, the said C.; and notified the obligors not to pay the bond to the said executors, and that it was her property and in her possession, and that she should sue the obligors. The executors gave notice to the obligors not to pay the bond to C., and that they should sue if it was not paid to them; and afterwards commenced an action at law against the obligors, and declared upon the bond as a lost bond. The obligors filed a bill against the executors and C., praying that they should interplead, and praying an injunction restraining them from proceeding at law. The injunction was allowed.

The answers admitted the facts on which the prayer for interpleader was founded, the answer of C. setting forth the grounds of her claim to the bond. No decree was taken against the defendants to interplead; but the proofs on both sides, as between the defendants, were taken and the cause brought to hearing; and it being ready for a decision, both as between the defendants and as between them and the complainants, it was heard and a final decree made.

The Court said that C. held the affirmative and was entitled to the opening and reply.

In equity there may be such an agreement by parol as will pass the right to a chose in action; but the proof of the agreement should be clear. The proof in this case was held insufficient.

On the 1st of April 1843, Isaac Rowe, with Jacob Rowe as his surety, gave a bond of that date to Betsey Hoagland, since deceased, conditioned for the payment of \$1,500 in one year with interest.

On the second day of July 1844, Betsey Hoagland died, leaving a will, and administration with the said will annexed was granted to John B. Matteson and David Hill.

The said Rowe bond is in the possession of Kitty Weart; and she, on the 17th of March 1845, by notice in writing served on the said Isaac and Jacob Rowe, forbade them from paying the said bond to the administrators of Betsey Hoagland, deceased, stating in the said notice that the said bond

was delivered and transferred to her the said Kitty Weart for a valuable consideration, by the said Betsey Hoagland in her lifetime, and that it was the property of her the said Kitty and in her possession; and that it was her intention to institute legal proceedings against the said Rowes for the recovery from them of the amount due on the said bond.

On the first of May 1845, the administrators &c. of Betsey Hoagland, deceased, by notice in writing served on the said Isaac and Jacob Rowe, forbade them from paying the said bond to the said Kitty Weart, and demanded that it be paid to them; stating in the said notice that it was the property of the said Betsey Hoagland, deceased, and belonged to her estate, and that unless it was paid to them they should institute legal proceedings against the Rowes for the recovery thereof.

After the service of the last mentioned notice, the said administrators commenced an action of debt against the Rowes, on the bond, and declared upon it as a lost bond.

The Rowes then filed a bill of interpleader stating that they have always been and now are ready to pay the said bond, and offering to pay it to such person as the Court shall direct, and praying that the said administrators &c. of Betsey Hoagland and the said Kitty Weart may interplead; and that in the meantime they may be restrained from proceeding at law against them.

The injunction was allowed.

Answers were put in by Kitty Weart and the administrators &c. of Betsey Hoagland, deceased.

The answer of Kitty Weart states that Betsey Hoagland was twice married, first to David Stout, and after his death to John Hoagland, who died in August 1842. That after Hoagland's death the said Betsey, being advanced in years and infirm, and having no children and but one brother, who lived in the State of New York, and being an aunt of her the said Kitty, she the said Kitty shortly after the death of the said Hoagland invited the said Betsey to make her house her home; and that in compliance with such invitation the said Betsey did, about two

months after the death of the said Hoagland, remove from Readington, Hunterdon County, where she had resided, to the house of her the said Kitty in the township of Hope-well, bringing with her her goods, furniture and whatever articles of property she possessed. That at or about the time of such removal she informed the said Kitty that she had a claim against John S. Hoagland, the son of her late husband, of about \$1700, which she believed and expected would some day be paid or secured to her. And that the said Betsey proposed to her that she should permit the said Betsey to live with her as one of her family, during her life, and that as a compensation therefor she said Kitty should have whatever the said Betsey might realize out of the said claim. That she the said Kitty, in consequence of her connexion with the family had before heard of the said claim, and was satisfied it was just and might be enforced; and that she might avail herself of the benefit of it. That she therefore acceded to the proposal which had been made to her, and agreed with the said Betsey that in consideration of the said claim and of the amount that might be collected thereon, she would take care of the said Betsey and provide for her during her life. That in pursuance of this agreement she did from that time forward continue to take care of and provide for the said Betsey, the said Betsey occupying a part of her house and living in her family.

That in the spring of 1843 the said claim was adjusted between the said Betsey and the said John S. Hoagland. That for the interest which had accrued thereon, amounting to between \$800 and \$900, the said J. S. H. gave to the said Betsey his note; and for the principal of said claim paid to the said Betsey \$200 in cash, and for the residue of the principal, by an arrangement made between the said J. S. H. and the said Rowes, the said bond of the Rowes conditioned for the payment of \$1500, was given to the said Betsey. That after the said Betsey had received the said bond, she expressly stated to this defendant in the presence of witnesses that this bond, with all the moneys that might be due thereon, was to be her property, in pursuance of the agreement originally made with her, provided she continu-

ed to take care of her the said Betsey and provide for her during her life. That the same assurances were frequently made to this defendant by the said Betsey at subsequent periods ; and the said bond was always spoken of and treated by the said Betsey as the property of this defendant and held in trust for her, subject only to the said conditions. That the said bond was never formally assigned to the said defendant by the said Betsey ; and the reason she gave to this defendant for not doing so was that this defendant might fail to comply with the conditions of the said contract on her part, and thus put the said Betsey to the necessity of looking for a home and finding the means of support elsewhere. That the said Betsey continued to live with this defendant until her death July 2, 1844, being then 76 years old. This answer then states the care, trouble and expense of this defendant in taking care of the said Betsey. That having faithfully fulfilled &c., she considered herself fairly entitled to the said bond ; and on the death of the said Betsey regarded it as her property, and accordingly retained it in her possession.

The answer of the administrators &c. of Betsey Hoagland sets forth her will, which gives all her property to Sarah Jane Lewis, and other matters not important for the consideration of the question involved in the case.

The testimony, so far as material, is as follows :—

Adelia Weart, for Kitty Weart. She is a daughter of the said Kitty, and will be 20 in July. Mrs. H. was to live with mother her lifetime for the money she got of John S. Hoagland. Has heard Mrs. H. speak of a claim she had against J. S. H. Has heard her speak of the amount of it. It was \$1500. That is the claim she just said her mother was to have for keeping her during her life. The first conversation she recollects to have heard between her mother and Mrs. H. about this matter was about three months after Mrs. H. came there to live. She said, while all were there together, she wished us to remember what she said : she then asked mother if she would be willing to keep her as long as she lived for that money she would get of J.

S. H. Mother replied she would. Gen. Manners, mother, witness and her younger sister were present. She heard this subject referred to frequently by mother and Mrs. H. Has heard Mrs. H. speak of a bond of \$1500 as having been received of Isaac and Jacob Rowe in satisfaction of that claim against J. S. H. This bond was frequently referred to and talked about by mother and Mrs. H. Mrs. H. always spoke of this bond as the money mother was to have in pursuance of that agreement.

Jacob S. Weart, for Kitty Weart. He is a son of Kitty Weart. On one occasion Mrs. H. sent for David Stout to see about putting out some money she expected to receive from N. Brunswick and upon some small notes from persons in our neighborhood. He came, and aunt (Mrs. H.) said, when speaking of putting out the money, that the bond she intended for mother for keeping her as long as she lived. She referred to the Rowe bond. Witness had heard of this bond before: saw it shortly after aunt got it. On another occasion he heard Mrs. H. say she was going to get this money and was going to give it to mother for keeping her. Heard Mrs. H. say the Rowes had given notice that they were going to pay the bond the spring after it was given.

James S. Manners, for Kitty Weart. He was present on the occasion related by Miss Weart: it was the latter part of Dec. 1842 or first part of Jan. 1843. Mrs. H. said—now you are all together I want to talk with you or consult with you. She said, I have been talking with Mrs. W. I think she can afford to keep me as long as I live for that money I am to get of John S. Hoagland, if I get it. I rather expect to get it. She then asked witness what he thought of it—whether Mrs. Weart could afford it. Witness told her he thought Mrs. W. could well afford to do it, or words to that effect. Mrs. W. replied—yes, aunt, you shall have a home as long as you live, as long as she, Mrs. W. had one. This was all of it. Witness supposed it was a contract unless altered. The bond in question was not then given.

Jared S. Weart, for Kitty Weart. He is her son. Was present on the occasion referred to by his sister and Gen. Manners: it was two or three months after Mrs. H. came there.

She came into the room and said she wished all to take notice what she said, and said she had been telling Kitty she thought she could afford to keep her as long as she lived for the money she was to get of John S. Hoagland. Mother told her she would—she should never want a home as long as she had one. Remembers her asking Gen. Manners if he did not think she could afford to keep her for that, and he said he thought she could afford to keep her very well. Never heard Mrs. H. refer to this matter on any other occasion. Had heard this claim spoken of before in the family by Mrs. H. The Rowe bond was afterwards taken for this claim.

Cross-examined. Mrs. H. made some presents to mother but they were all delivered up after a suit was commenced for them.

George Vlerebome for the administrators &c. of Betsey Hoagland. He paid Mrs. H. \$200 and interest in May before her death, at the house of Kitty Weart. Kitty was present when he paid it. He paid it on the stand, and it was there when he left. He had borrowed \$250 and given her his note for it. Sometime after that she requested him to draw a new note for the money to Jas. S. Lewis, which he did. After James' death she requested him to draw a new note for it to herself, which he did. The said payment was made on this last note. The reason she gave for taking the note to Jas. S. Lewis was that the property was to go there after she had done with it. James T. Manners was at his house after the death of Mrs. H. We talked, among other things, about this bond in dispute. He said that Mrs. H. asked him if Mrs. W. would not be well paid if she got the money coming on this bond. Witness asked if he thought she meant the principal or the interest. He said he took it that she meant that the interest alone would pay her.

James S. Wykoff, for the administrators. He called to see Mrs. H. shortly before her last illness and saw her. His object was to get \$1 Mrs. H. subscribed towards the erection of a Methodist Church. She said she expected money, saying from whom; that she wanted it, and wanted to help Kitty a little

too, for she had been very kind to her. Mrs. W. was in the room at the time.

Mary Lewis, for the administrators, testifies to a conversation with Mrs. H. in which Mrs. H. said, among other things, that Sarah Jane Lewis, daughter of James Lewis, deceased, would now get more of her property, for she was getting of John S. Hoagland what she expected was lost.

John B. Matteson, for the administrators. He was at Mrs. W's. to see Mrs. H. on business. Was there three times in April 1844. He had drawn her will, and had frequent conversations with her about the disposition of her property. At one time she asked him to take the papers and take care of them. They were looking over her papers. The bond was one, the Waldron note another, (and mentioning several others). She wished witness to take the papers and take care of them for the child named in her will. Witness told her they were safe there and she had better keep them herself. She said she believed they were safe, and kept them. Witness paid her at one time \$200 in the spring after she moved to Mrs. W's. He got it from John S. Hoagland. He paid Mrs. W's. son Jacob \$30 for Mrs. H. shortly before her death. At one of his visits to Mrs. H. they made a calculation of the amount she would have to leave to the little girl named in her will, and we made it about \$3000. When he paid her the \$200 she said it would pay what she owed and leave her \$100 to lend to a person she named who wanted it. Thinks she mentioned that she wanted to pay for her board and some little things she wanted to get, but he will not be certain.

Cross examined. She never told him how she was living with Mrs. W. Witness inquired of her about it: she waived the question and did not tell him. When he asked if she would have enough to live on she signified she would have enough of the \$200 to pay her board and put out \$100. To his question what she paid for board, she replied Mrs. W. and she knew about that, and smiled. He then asked her if she would now have enough to live upon, and she said yes, I shall now have enough to pay my board, and \$100 to put out.

In chief. This conversation had reference to the \$200 he paid her and was at that time. At the time of taking the in-

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ventory he demanded the Rowe bond of Mrs. M. She replied that Mrs. H. had made a verbal disposition of it.

Cross-examined. Mrs. W. did not say for what consideration Mrs. H. had disposed of it.

James S. Manners again called for Kitty Weart. He remembers the conversation alluded to with Vlrebome. Witness's object in going to Vlrebome's was to collect testimony to support the caveat against Mrs. H's. will. If the will had been set aside he would have been one of the heirs. Vlrebome said Mrs. W. claimed the bond under a contract to keep Mrs. H., as he understood. Witness told V. he heard Mrs. W. claimed the bond, and it was very probable there had been a contract between them, and then assigned his reasons for thinking so; that in the latter part of Dec. or beginning of January, after Mrs. H. moved to Mrs. W's., Mrs. H. said something like this:—now we are all together I want to talk with you, or something to that effect; said she, I have been telling Kitty that if I get that money of John S. Hoagland I think she can afford to keep me as long as I live for it. She then appealed to witness and said don't you think she can? Witness replied he thought she could very well, or something to that effect. Either Vlrebome or Stout asked witness if he supposed she meant the principal or interest. His remark was that he supposed either would have paid her. The bond in question was not then in existence. Witness referred to the money due Mrs. H. from J. S. H. When he said that either principal or interest would pay, he meant to get round the question. He did not mean to make evidence to break his own head. In the conversation between Mrs. H. and Mrs. W. nothing was said about interest or principal. It was that money of J. S. H. if she got it, and she was then encouraged to think she would get it.

The counsel differed as to who was entitled to the opening and reply.

The Court said it was on Kitty Weart to maintain the affirmative of her proposition, that the bond by parol agreement became hers.

R. S. Field and *W. Halsted* for *Kitty Weart*. They cited 1 *Greenl. Evid.* 514; 1 *Mad. Ch.* 443, 4; 4 *Taunt. Rep.* 326; 1 *Ves.* 332; 1 *Hill's S. C. Rep.* 187; 4 *Tenn. Rep.* 690; 1 *Chit. Gen. Pr.* 106; 19 *John. Rep.* 342; 16 *Ib.* 51; 15 *Mass.* 485; 2 *Cond. Eng. Ch.* 410, 411; 3 *Ib.* 699; 1 *Ves. Sen.* 348; 2 *Story's Eq. Sec.* 1055, 1057a, 1047; 11 *Price* 110; 3 *Swanst.* 393.

S. R. Hamilton and *P. D. Vroom* for the administrators &c. of *Betsey Hoagland*. They cited 2 *Kent's Com.* 438, 9; 2 *John. Rep.* 52; 9 *Law. Lib.* 15, 68, 126, 134; 1 *Mad. Ch.* 383; 1 *Peter's* 380; 12 *Ves.* 37.

THE CHANCELLOR. On a bill of interpleader there should, regularly, be a decree that the defendants interplead, and the case then becomes a case between the defendants, as between a complainant and defendant. But as the proofs have been taken on both sides as between the defendants, and the cause is brought to hearing and is ready for a decision, both as between the defendants and as between them and the complainants, it may now be heard and a final decree made.

On the merits of the case I think it was a proper case for a bill of interpleader and for the injunction which was granted. In equity there may be such an agreement by parol as will pass the right to a chose in action. As between the defendants I have only to remark, that the proof of such agreement should be clear, and that I think the proof in this case insufficient.

Decree for the executors.

CITED in *Condict v. King*, 2 *Beas.* 383.

SARAH V. SCHANCK, an infant, by her next friend Wm. R. McMICKLE *vs.* HANNAH SCHANCK, JOSIAH SCHANCK and others.

On a bill charging executors with having converted a part of the estate to their own use, and the insolvency of the executors; and that they are about to sell real estate in a manner forbidden by the will; and the apprehension of the complainant that they will convert the proceeds of such intended sale, also, to their own use; an injunction was granted restraining such sale.

Insolvency is not a sufficient reason for taking the administration of an estate out of the hands of executors.

Facts insufficient to authorize it to be done.

Bill filed February 17, 1848, by Sarah V. Schanck, an infant, by Wm. P. McMickle, her next friend, stating that on the 1st of April, 1843, Wm. Schanck made his will, giving to his wife Hannah his black woman Sally and all the furniture in his house, as long as she remained his widow; but if she married, then the property to go back to his children; giving to his son Josiah a one horse wagon and \$300 over and above the shares of the other children; appointing his wife and his son Josiah executors; giving one share to his son William, \$250 that he has already had to be deducted out of his share; one share to his son Jesse; one share to his daughter Mary, to do with as she sees fit as long as she lives, but if she never marries again and has no more heirs, then \$250 to be given to her son Stephen, and the rest to the children of the testator at her decease; \$25 to his daughter Letitia Duncan for her share, she having already had \$175; one share to his daughter Hannah Brown, her proportion not to be paid to her, only the interest, the balance to be secured by the executors for her children; \$150 to be deducted out of her share, she having had that already; one share to his daughter Teresa; one share to his daughters Sarah and Jane, and \$50 to each for their schooling; one share to his daughter Eliza, and \$100 for her schooling; those three small legacies to come out of those children who have already had their bringing up; di-

recting all such personal estate as is not wanting, to be sold ; his real estate to be sold for good current money, but not upon credit, and the amount thereof secured in such manner as is usual in like cases to insure the full and punctual payment thereof ; giving his executors power to sell his real and personal property as fully as he could do himself ; directing the net proceeds of his personal estate thereby directed to be sold, if any there be after his small debts are paid, to be divided between his wife and children, share and share alike, with the exception of Letitia Duncan ; and the net proceeds of his real estate in like manner, as soon as it shall come into the hands of the executors. If any of the heirs should die before they arrive at age, their share or shares to be divided in like manner.

That the testator died October 1, 1843, leaving ten children, (naming them,) of whom the complainant is one ; that the said Eliza, Jane and the complainant are under twenty-one. That the said executors proved the will, and possessed themselves of the personal estate to a great amount, and entered into and took possession of the real estate, or into receipt of the rents and profits thereof, and have ever since continued and now are in such possession and receipt.

That the said executors have not paid any of the said legacies except that of \$25 to Letitia Duncan ; nor have they made any settlement of the estate in the Orphans' Court ; nor have they, as the complainant believes, paid the debts of the testator ; but have, ever since his death, used the property of the testator, both real and personal, as their own ; and that the personal property of the testator, consisting of horses, cattle, wagons, carriages, farming utensils and household furniture and a library of books, have been greatly deteriorated and diminished in value, and that the executors have not sold any of the personal estate, but have kept and used the same. That the testator was possessed, at his death, of a large book-case and library of books, worth, in the opinion of complainant, between \$300 and \$400 ; and that the said books and book-case have recently been advertised for sale by the executors on the 1st of March ; that the executors, instead of selling the cattle and stock, have killed and converted to their own use, nearly all the cattle,

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hogs and sheep which belonged to the testator at his death ; that two valuable horses owned by testator at his death were not sold by the executors, but have been used and worked by them until they are of little value ; that the executors, in violation of the will, have exchanged some of the real estate, situate in Cranberry, with one ——— Buckley, and received in exchange therefor a lot of land and the residue in money ; that they have, as the complainant believes, entered into a contract to sell all the residue of the real estate, consisting of more than 100 acres, to one Andrew Duncan, for \$4,700, and to receive his bond, payable the 1st of April or May next, for \$2,000, and to take his bond secured by a mortgage on the said real estate for the residue. That the said executors are wholly irresponsible, and if they receive the money for the land they are about to sell, it would be impossible for the complainant to recover out of their hands the amount she is entitled to.

That Wm. A. Bowne and Hannah his wife, the said Hannah being a sister of complainant, and entitled to a share under said will, on the 8th of February instant, filed a bill in this court against said executors, praying an injunction against their selling the said real estate to the said Andrew Duncan, on a credit, or, if already sold, to restrain the said executors from receiving the money or any obligation or security therefor. That the injunction prayed was issued, and served on the said executors on the 11th of February instant ; and that on the next day, the said executors called on the said Bowne and wife, and agreed to give them security for their share of the estate, and also to give Duncan as security to the complainant for the payment of her share, if Bowne and his wife would agree to settle and withdraw the said injunction ; that Bowne and wife, relying on the promise of the said executors, agreed to do so, and did withdraw the injunction ; and the said executors thereupon gave security to the said Bowne and wife for their share ; but the said executors, in violation of their said agreement, wholly neglected and refused to give security for the complainant's share. That the said executors have wholly neglected to perform the trusts imposed upon them by the will, and that the sale they are now about to make to Duncan on a credit is a violation of the terms of the will, and a breach of trust ; that if they should

be permitted to receive the money from Duncan, they would, as the complainant believes, apply the same to their own use, and would not pay or secure to the complainant when she becomes of age the share she is entitled to. That the will ought to be established, and the trusts thereof performed under the decree of this court; and that a suitable person ought to be appointed to collect the outstanding personal estate, and sell the same and collect the proceeds thereof, and receive the rents of the real estate, and to sell the said real estate, and receive the proceeds thereof, and appropriate, under the direction of the court, according to the trusts in the will. The bill prays that an account may be taken of what is due the complainant, and that it may be paid or secured to her, and for an injunction restraining the executors from selling the said real estate on a credit to Duncan, or, if it has been already sold, from receiving the money or obligation or security from Duncan in payment therefor; and that said Duncan may be enjoined from giving his obligation to said executors, or from paying them any money thereon; and that Duncan may be decreed to pay the purchase money for the said farm unto this court, or to a receiver to be appointed by the court; and that the sale to Duncan may be made under the direction of the court or of a receiver; and that the executors may give security, under the direction of the court, for the due performance of their trusts under the will, or that a new trustee may be appointed to perform said trusts; and for further relief.

An injunction was granted.

The defendants in their answer say, that the inventory and appraisement of the personal estate amounted to \$927, 97, including the household furniture given to the defendant Hannah during her life or widowhood, which amounted to \$223 18, including the wearing apparel appraised at \$5; that the said inventory also included the black woman, appraised at \$5, and the sum of \$94 77, a book account against Wm. A. Bowne; that the balance of the said inventory is made up of personal property not bequeathed, including sundry book accounts amounting to \$179 13; that after deducting from the amount of the said appraisement the personal chattels bequeathed to the said Han-

nah and the amount of the said book account against Wm. A. Bowne, there remained in their hands assets to about \$426 07, consisting of some stock, farming utensils, hay, grain, &c., as by the said inventory will appear.

They deny that they entered into and took possession of the real estate, or into the receipt of the rents and profits thereof, except that the testator was in possession of a farm of about 113 acres, and also of a lot of about 19 acres.

That he moved on the said farm the spring before his death. That at his death all his children were at home except Letitia, wife of Peter Duncan, Hannah, wife of Wm. A. Bowne, and William, who was married. The remaining seven children were at home and unmarried and remain unmarried. That about six months after the testator's death Mary——— went to N. York and has remained there ever since, but left her little boy with the family who remained there until last fall. That Jessie, one of the children, remained at home on the farm for about two years after his father's death, and after that was home occasionally. That Sarah, the complainant, has been away from home for about three months last past, and that the remainder of the unmarried children have remained on the farm with these defendants, except Teresa, who has been absent at N. York about a year, but is now at home.

They admit that they, with the other members of the family as above stated, have been and still are in the possession of the farm; and say that after the testator's death it became necessary that some provision should be made for taking care of the family, and especially the younger children, four of whom were then under age. That for reasons after stated, it became impracticable to sell the real estate, or offer it for sale the fall and winter after testator's death; and it was considered best for all interested that the family of children at home should be kept together at the farm, at all events until the ensuing year, when the property might be sold. Accordingly the defendant Josiah, being the oldest son, undertook the charge and management of the farm, so as to provide for the wants of the family, and assisted by Jesse, a younger brother, worked the farm and did the best he could, by and with the advice of his co-executor,

the defendant Hannah, for the general benefit of the family; the defendant Josiah being anxious that his younger brother and sister, who had but little property, should be brought up respectably as the other children had been, as far as he might be able to effect such result.

The defendants say that the reason why the farm could not be offered for sale during the fall and winter after the testator's death was that soon after his death Wm. A. Bowne, who had married the daughter Hannah, filed a caveat against proving the will, on the ground, as the defendants are informed, that the testator was not competent to make a will; and these defendants were thereby delayed in the probate of the will until March 29th, 1844, when it was too late to offer the farm for sale, and it was concluded best for the family to remain as before stated.

They say that in the fall of 1844, and within a year after the probate of the will, they advertised the farm for sale, and on or about the second of Jan'y 1845 set it up at public auction. That a number of persons attended, and every effort was made by the defendants to sell the property, but the highest bid obtained was \$30.20 an acre; and this being considered entirely too low, the farm was bid in by Jesse for the common benefit of all interested; and it was then agreed by these defendants and all the children who were at home, and with the approbation and consent of those who were away from home, as these defendants believe, that these defendants should remain upon the property and use it and appropriate the proceeds thereof to the benefit of the family, and the education and maintenance of the younger children. That from that period the family have been taken care of and provided for, comfortably and respectably, and the house has been the home of all the children whenever they chose to come and make it such.

The defendant Josiah says, that in remaining on the farm and devoting his time and labor to cultivating it, and in taking care of the family, he derived no pecuniary benefit; nor was it any personal advantage to him. That the main object was to take care of the family, and especially those who were too young to take care of themselves. That he stipulated for no salary or compensation for his time or labor, and has not

received as much from the said farm as the other members of the family who were living there.

That they did not make sale of the personal estate, but retained the same for the purposes of the farm, and have used it prudently and carefully; and they deny that they have used the said real and personal estate as their own, and taken to their own use the rents and profits of the real estate otherwise than as before stated.

They admit they have not settled their accounts in the Orphans' Court; and say it was impracticable to do so, the farm remaining unsold; and deny that they have not paid any debts; on the contrary, Josiah alleges that he has paid debts, including the expenses of the administration, to about \$800.

That other debts remaining unpaid, two of them amounting together to \$600, being mortgages on the land, and the mortgagees being desirous of receiving their money, and the children being all grown up, and the said Josiah being desirous of engaging in some other business, and having an opportunity of selling the farm for a fair value, the defendants, early in February last, (1848,) entered into an agreement with Andrew Duncan to sell the farm to him for \$4,700; and in pursuance of said agreement, they, by deed of bargain and sale, dated Feb. 8th, 1848, conveyed the same to the said Duncan, who then and there gave to these defendants a note for \$2,000 to be paid on the delivery of the property to him this spring, and a bond and mortgage on the said property for \$2,700, payable one half in one year, and the residue in two years, with interest from the first of April of the present year.

They say they have not sold said property on a credit, nor in any way violated the will. That their sole object has been to dispose of the property safely, to the best advantage and on the best terms that could be procured. That they expected out of the first payment to discharge the remaining debts of the estate, and will be unable to do so if the injunction shall be permitted to continue.

They say that for the purpose of disposing of the personal property they did, early in Feb. last, advertise the same to be sold on the 1st of March then next, and did accordingly sell the

same at public vendue. And although it may be that some articles had become less valuable by ordinary use, yet they deny that the personal property as a whole had become greatly deteriorated and diminished in value. On the contrary, they say that the amount of sales of the personal property was greater than the appraisement of the same property or its equivalent. Some of the cattle and other stock had been killed and used to the use of the family; but others had been raised and substituted, and were sold as the property of the estate.

They admit there were two horses, a brown horse and a bay mare; but deny that they were or could be considered valuable. The horse was appraised at \$35, and the mare, with a colt, at \$35. At the sale the horse sold for \$26, and the mare for \$20.25, and the colt which the defendants had raised, for \$45, and another colt also raised by him, for \$8.75. They admit there was a book-case and books of some value, which were appraised at \$35, but deny that they have become greatly deteriorated, and deny that the said book-case and books have been or were advertised for sale on the 1st of March, or at any other time; but say they had no thought whatever of selling or offering them for sale, nor is it at all mentioned in the notice of sale; and that the said case and books have been carefully used and properly taken care of.

They say they have sold a part of the real estate and received therefor a sum of money and the residue in a lot of land; but they do not admit that the said sale was in direct violation of the terms of the will. That the testator, at his death, besides the farm owned a lot of 19 acres near Cranberry. That there were some debts and claims required to be paid, and among others the expenses they had been subjected to in resisting the said attempt to set aside the will; and having no means in hand to satisfy the same they sold the said lot advantageously, as they then believed and still believe, to one Joshua Brickly, receiving therefor \$500 in cash and a small building lot in Cranberry which was held for the benefit of all interested in the estate. That they intended and expected to sell the building lot this spring, so that they might be able to settle the estate at an early day, but have been deterred from selling or attempting

to sell it by the proceedings instituted in this court. They submit that if it should be considered that they were not authorized to sell the said lot as they did, they nevertheless acted in good faith and for the benefit of all interested, and are not obnoxious to the charge of violating the will.

They admit that they have very little property except what they may derive under the will; but say they have as much now as when they were appointed executors. They suppose they were appointed, not because of their wealth, but because the testator had confidence in their integrity; and as they have endeavored faithfully to discharge their duty, and have not in any way wasted the estate or injured the rights of those claiming under the will, and especially of the complainant, they submit that the charge made in the bill that if they should receive the money for the real estate it would be impossible for the complainant to recover out of their hands the amount she is entitled to is entirely gratuitous and unmerited, and ought not to have been made.

They admit that Bowne and wife, on the 8th of Feb. last, filed a bill against them praying an injunction to restrain them from selling the said real estate to Duncan on a credit, or if already sold, from receiving the money or any obligation or security therefor; and that an injunction was issued; and that they afterwards made a settlement with Bowne for his wife and children's share; but they deny that it was a condition of the said settlement, or that it was agreed at the time by these defendants or either of them and the said Bowne or any one else, that they would give Duncan or any other person as security to the complainant in this suit for the payment of her share, and that, relying on the said promise, the said Bowne and wife agreed to settle the said suit, and withdraw the said injunction; but they say that Bowne, being an attorney at law, as they understand and believe, filed the said bill against them; that not wishing to be involved in any litigation, they agreed to settle with Bowne. That by the will the interest only of his wife's share was to be paid to her, and the share itself was to be secured by these defendants for her children; that although no settlement of the estate had been made, and some of the property

remained unsold, an estimate was made by Bowne of his wife's share, and he made the amount \$554, on which there was then due for interest \$44; that Bowne being entitled to this interest, as the defendants supposed, they gave him a note for it, which remains unpaid, and which they expect to pay when it becomes due and payable. Bowne then pressed to have the principal paid to him, or that these defendants should give him a note for the amount which he said he was entitled by law to receive and hold. That the defendants not believing that Bowne was so entitled refused to settle on any such terms. But for the sake of peace it was finally agreed between them and Bowne that they should give him their note with security for \$554; and that on his receiving the money he should give ample security that it should be paid to the children according to the will or to indemnify these defendants. That accordingly such note was given with A. Duncan as security, and delivered to Bowne; but whether it was made payable to him as guardian, or how otherwise, they do not recollect. The defendant Hannah says, that at the time of this settlement Bowne requested of her that the executors would give him a memorandum shewing that they would pay the complainant in this suit the share that should appear to be coming to her on a settlement of the estate in the Orphans' Court; to which this defendant assented, and thereupon Bowne drew up a paper which this defendant signed; that the defendant Josiah was not present at the time. The defendants say that soon afterwards Bowne requested Josiah and the other executor to sign the said paper and give Duncan as security for the payment. That thereupon the said Josiah said he knew nothing of any such agreement, and declared he would not sign it. They aver that such paper or alleged promise had nothing to do with the settlement then made with Bowne, and that Bowne did not make a settlement with them for the share of his wife and children on the condition or with the agreement that they would at the same time give such writing and security, or any other, for the payment of the share of the complainant in this suit; but on the contrary he voluntarily and without any consideration whatever, endorsed on the injunction he had obtained, or a copy thereof, the following:—"I hereby agree that the injunction of which

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the within is a copy, may be dissolved, and hereby relinquish all opposition to the selling of the farm by the within executors, and consent to the payment to them of the purchase-money by Andrew Duncan.

Dated Feb. 12, 1848.

W. A. BOWNE."

The defendant Josiah, answering for himself, says that it was not till after the notes had been given by these defendants to Bowne and Bowne had receipted the injunction, that any thing was said to them by Bowne about giving or signing any paper or giving security for the share of Sarah, the complainant; and that on his mentioning the same he, Josiah, was surprised and utterly refused to do it. And the defendant Hannah, answering for herself, says that when she signed the said paper there was no security named or mentioned in it; but she observed a blank in it which Bowne afterwards filled up by inserting the name of Andrew Duncan without her consent.

The defendants say that when Bowne and wife filed their said bill Sarah was at the residence of the said Bowne in Hightstown, where she had been for some little time, and they verily believe she has remained there since by the advice of Bowne, and that the bill filed in the name of the said Sarah has been filed by the instigation of Bowne, and not of the said Sarah. That Wm. McMickle, who appears in the said bill as the next friend of the said Sarah, is a single man, of no visible property, and comparatively a stranger to these defendants, and who can have but little if any knowledge of the affairs of the said estate. And the defendants believe that this suit has been instituted for the purpose of inducing them to make some settlement with Bowne or McMickle of the share of the said Sarah, and to pay or secure to them or one of them, or to her, more than she can be justly entitled to under the will.

The defendant Hannah says that with the view of effecting such purpose, as she believes, shortly after this suit was instituted and the injunction served, Bowne and McMickle came to the house of these defendants, and while there Bowne requested her to sign a paper which McMickle had, whereby she would agree to pay \$504 as and for Sarah's share, which she refused to

do ; not be willing that the property of her daughter should be committed to their keeping, and believing that the said sum was more than she was entitled to.

The defendants say they are perfectly willing that an account should be taken of all the assets that have come to their hands, and for which they may be in any way responsible, and to pay the balance, if any, as the court shall direct ; but until the money shall be received from Duncan for the farm, and until the said building lot in Cranberry shall be sold, it would be impracticable for the defendants to make a final settlement ; but they are willing and desirous that the estate shall be settled under the direction of this court as soon as practicable.

Duncan, in his answer, says that early in February last he contracted with the said executors to buy the said farm, for \$4,700 ; \$2000 to be paid this spring, and, as he believes, on the 1st of May, for which he gave his note, dated February 8, 1848, which he is now prepared to pay on the delivery of the property ; the remaining \$2,700 secured by bond and mortgage on the property, of the same date, half payable in one year and half in two years, with interest on the whole from April 1, 1843 ; and the said executors thereupon conveyed to him the said property. He avers that he gave a fair and valuable consideration and price for the property, and expects soon to take possession of it, and is prepared to pay the amount of the said note whenever he is permitted to do so by this court and to pay the same as the court may direct.

On this answer, a motion was made to dissolve the injunction.

P. D. Vroom for the motion.

W. Halsted contra.

THE CHANCELLOR. I do not think that any such misconduct in the executors, or ground for apprehending waste or loss appears in this case, as calls upon the court to take the administration of the estate out of their hands. Insolvency alone would not be sufficient.

Injunction dissolved.

JAMES M. BLACKWELL, EDWARD A. WHITTEMORE and WILLIAM CAHART *vs.* ANDREW RANKIN, GEORGE H. LEE and others.

The quasi lien of the creditors of a partnership on its property, as against creditors of individual members of the partnership, gives equity jurisdiction for the purpose of protecting the members of the partnership.

The affidavit required by the statute to be made by the plaintiff, on his taking a judgment by confession on bond and warrant of attorney, must show a debt existing at the time of the entry of the judgment.

A. and B., partners in trade, confessed a judgment to C. The affidavit of C. stated the consideration to be, in part, notes of A. and B. endorsed by C. and not due ; in part, notes of other persons given to A. and B. and endorsed by C. and not due ; and in part, notes lent by C. to A. and B. for their accommodation and not due. Execution was issued on the judgment and levied on all the property of the partnership. On bill filed by D., a creditor without judgment of the partnership of A. and B. C., was restrained by injunction from proceeding to a sale under his execution. And on motion, without answer, to dissolve the injunction, the motion was denied

On the 8th of April, 1848, Andrew Rankin and George H. Lee, partners in trade under the name of Rankin and Lee, gave a bond and warrant of attorney to confess judgment thereon, to Wm. Lee, in the penal sum of \$20,000, conditioned for the payment of \$10,663 ; and judgment was confessed thereon on the said 8th of April, 1848. The affidavit required by the statute, made by Wm. Lee, stated the true consideration of the bond to be to secure the said Wm. Lee for certain promissory notes which he had endorsed for Rankin and Lee, as follows :

Note given by said Wm. Lee, due Apr. 24, 1848, for \$175

" of said Wm. Lee,	" May 22, 1848, "	390
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" " "	" June 7, 1848, "	300
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" " "	" June 20, 1848, "	490
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" " "	" June 21, 1848, "	480
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" " "	" Aug. 22, 1848, "	1100
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" " "	" Aug. 10, 1848, "	150
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On bond and mortgage executed by the said Wm. Lee to Saml. Cook for \$1672, given upon land of the

said Wm. Lee, dated May 29th, 1845, payable in one year, with interest, which money was then and there lent by Saml. Cook to Rankin and Lee, interest on said bond being paid to Nov. 1849,				1675
One note of Alfred Mead endorsed by said Wm. Lee, due May 5th, 1848,				490
One note of Alfred Mead	"	"	"	500
due May 5th, 1848,				339 21
One note of Alfred Mead	"	"	"	125
due May 25th, 1848,				150
One note of Alfred Mead	"	"	"	600
due July 28th, 1848,				100
One note of Rankin and Lee	"	"	"	550
due April 20th, 1848,				100
One note of Rankin and Lee	"	"	"	600
due May 30th, 1848,				500
One note of Rankin and Lee	"	"	"	100
due May 11th, 1848,				300
One note of Rankin and Lee	"	"	"	475
due May 27th, 1848,				
One note of Rankin and Lee	"	"	"	
due May 26th, 1848,				
One note of Rankin and Lee	"	"	"	
due June 30th, 1848,				
One note of Rankin and Lee	"	"	"	
dud June 27th, 1848,				
One note of Rankin and Lee	"	"	"	
due July 30th, 1848,				
One note of Rankin and Lee	"	"	"	
due July 1st, 1848,				
One note of Rankin and Lee	"	"	"	
due July 30th, 1848,				
One joint note of Andrew Rankin, Wm. Lee, Alfred and George H. Lee, to Saml. Cook, for \$650, with interest, dated Dec. 9th, 1845, interest paid to Dec. 9th, 1847,				650
One note of Andrew Rankin endorsed by Wm. Lee, due July 28th, 1848,				296 69

“ which notes, bond and mortgage hath been assumed
“ by Wm. Lee, who hath agreed with Rankin and
“ Lee to pay the same and save them harmless.”

On the 10th of April, 1848, Rankin and Lee confessed judgment in favor of Wm. Rankin, for \$2116,75. The affidavit states the consideration to be four notes loaned by Wm. Rankin to Rankin and Lee; one for \$500, due that day; one for \$521,60, due June 10th, 1848; one for \$470 15, due June 16, 1848; and one for \$568 45, due July 7th 1848.

On the same 10th of April, 1848, Rankin and Lee confessed another judgment in favor of Wm. Rankin, the consideration of which is stated in the affidavit to be an endorsement by Wm. Rankin of Rankin and Lee's note for their accommodation, due July 8th, 1848, for \$566 04.

On the same day, April 10th, 1848, Rankin and Lee confessed a judgment to Jonas Wood for \$832 95. The consideration stated in the affidavit is his said Wood's two notes to Rankin and Lee, for their accommodation; one for \$373 21, due May 18th, 1848, given for the accommodation of Rankin and Lee; one given to Rankin and Lee for their accommodation, for \$496 23, due June 20th, 1848.

On the same 10th of April, 1848, Rankin and Lee confessed a judgment to Elias Plum, for \$795 51. The consideration stated in the affidavit is money lent.

On the same day Andrew Rankin confessed a judgment to Elias Plum for \$298 28. The consideration stated in the affidavit is Plum's acceptance of A. Rankin's draft for \$298 28, due May 13th, 1848.

On the same day Rankin and Lee confessed another judgment to Wm. Lee for \$5000. The consideration stated in the affidavit is to indemnify Lee against loss and damage by reason of his having endorsed a large amount of business

paper, notes and bills of exchange of the said Andrew Rankin and George H. Lee, to enable them to get their bills and notes discounted and passed away, amounting in all to \$17,398.44, whereof \$3,253.13 is past due and has not been paid.

On the same day Rankin and Lee confessed another judgment to Wm. Lee for \$550; the consideration for which, stated in the affidavit, is money lent.

On the same day Rankin and Lee confessed a judgment to Caroline Hayden for \$206; the consideration for which, stated in the affidavit, is money lent.

On the same day George H. Lee confessed a judgment to Caroline Hayden for \$143.25; the consideration for which, stated in the affidavit is money lent, loaned, &c.

Executions were issued on all these judgments, and the sheriff, by virtue thereof, levied on all the property of the said firm of Rankin and Lee, and advertised the same for sale.

In this state of things, James M. Blackwell, Edward A. Whittemore and William Cahart, partners in trade, creditors of the firm of Rankin and Lee, who had commenced suit, but had not obtained judgment for their demand, exhibited their bill against Andrew Rankin, George H. Lee, William Lee, William Rankin, Jonas Wood, Elias Plum and Caroline Hayden, charging combination and confederacy to defraud the complainants and others, the *bona fide* creditors of the said firm of Rankin and Lee, and to take into their hands the whole of the property of the said firm; and that the said judgments were confessed fraudulently, and praying that they may be decreed to be void, &c.; and praying an injunction restraining the sale.

The injunction prayed was allowed.

A motion was made, without answer, to dissolve the injunction.

J. P. Bradley and *A. Whitehead* in support of the motion, they cited 2 *John. Ch.* 144; 20 *John's Rep.* 296; 1 *Harr. Rep.*

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138, 268, 364; 16 *John Rep.* 149; 4 *Halst. Rep.* 93; 1 *Green's Ch.* 258; 5 *Halst. Rep.* 348; 3 *Green's Rep.* 373.

L. C. Grover and *C. Parker* contra. They cited *Rev. Stat.* 946, sec. 5; 2 *Halst. Rep.* 168; 1 *South. Rep.* 351; 1 *Halst. Rep.* 93.

THE CHANCELLOR. The Statute, *Rev. Stat.* 946, sec. 5, enacts, that no judgment shall be entered on a warrant of attorney to confess such judgment, unless the plaintiff or his attorney shall produce, at the time of confessing such judgment, an affidavit of the plaintiff, his attorney or agent of the true consideration of the instrument of writing or demand for which the said judgment shall be confessed; which affidavit shall set forth, that the debt or demand for which the judgment shall be confessed is justly and honestly due and owing to the person or persons to whom the judgment is confessed, and that the said judgment is not confessed to answer any fraudulent intent or purpose, or to protect the property of the defendant from his other creditors.

A number of cases have been before our courts in which the language and effect of this statute have been considered.

In the case of *Scudder v. Scudder* and *Coryell*, 5 *Halst. Rep.* 340, one objection to the affidavit was that it was made a day before the bond on which the judgment was confessed became payable, and was therefore prematurely made; the statute requiring the affidavit to set forth that the debt for which the judgment is confessed is justly due and owing. The objection was not that the debt for which the bond and warrant to confess judgment were given was not due, but that the affidavit to authorize judgment to be entered for the debt so due, was made the day before the bond on which judgment was to be confessed for the debt so due, was payable. The bond was payable one day after date, and, by oversight, the affidavit of the pre-existing debt, and of its being due, was made the same day the bond and warrant of attorney to confess judgment thereon were given. In reference to this objection, Ch. J. *Ewing* said, the design of the statute was simply to prevent the entering up of judgments where no indebtedness existed really and in good faith, and to defeat fraudulent purposes; and that the making the affidavit one day before the bond became

payable tends to no such evil as to vitiate the judgment. He said, further, that the word "due" sometimes means *debitum in presenti solvendum in futuro*, and sometimes that the day of payment has passed; and that it appears to have been used in the former sense, as it is connected with a word of like signification, the words being "due and owing." He also said, in reference to this objection, that the statute provided that no such judgment should be reversed for defect of form in the entry thereof. Just. Ford said it was a defect of form only of which third persons could not take advantage; but that courts allowed judgments to be impeached for fraud or covin, on the application of creditors, and have exercised an equitable power, immemorially, to inquire into them for these causes, and to set them aside; for fraud and covin will vitiate every kind of act; and fraudulent judgments are made as void against creditors as fraudulent conveyances. The motion to set aside the judgment was denied; but leave was given to move for a feigned issue to try the question of fraud. The application to set aside the judgment was by judgment creditors.

The case of *Warwick* against *Matlack*, in the Supreme Court, 2 *Halst. Rep.* 165, was this: a bond was given, dated Jan'y. 22, 1821, in the penal sum of \$2,800, conditioned for the payment of \$1,400 in three years, with interest annually, with a warrant of attorney to confess judgment thereon. In May 1823, judgment was entered, by virtue of the warrant, for the penalty, the annual interest not being paid. The affidavit stated that the true consideration of the bond was for land sold, and that the debt was justly due and owing. A motion was made to set aside the judgment, on the ground that the debt was not due and owing. It was answered, that on the non-payment of the interest the penalty of the bond was forfeited; that the debt then became due, and judgment might be entered for the penalty; that though judgment had been entered for the penalty, execution had been issued for the interest only. The judgment was sustained. The application to set aside the judgment was made by a purchaser of the land from the obligor, which would be bound by the judgment.

In *Reed* against *Bainbridge*, in the Supreme Court, 1 *South*

Rep. 351, Bainbridge, on the 12th of Feb., 1814, gave to Reed a bond and a warrant of attorney to confess judgment thereon. On the 14th of Feb., 1814, Reed, by endorsement under seal, assigned the bond to Thorn. On the 18th of Feb., 1814, judgment was entered on the bond, by virtue of the warrant of attorney, in the name of Reed. In April, 1814, one Schenck agreed with Bainbridge to buy his farm, and took possession of it; and on the 9th of May, 1814, received a deed for it and paid the consideration money. A motion was made on behalf of Schenck to set aside the judgment and execution, on two grounds: first, because the judgment was irregularly entered: second, that there was fraud in the bond and warrant and judgment. The judgment was set aside.

In *Milnor v. Milnor*, 4 *Halst. Rep.* 93, judgment on bond and warrant had been entered Feb. 16th, 1827, against John Milnor, who had died insolvent three days before. The judgment was set aside on motion in behalf of McNeely, a creditor of J. Milnor, who had not obtained judgment. The Court said that McNeely was admitted, in the state of the case, to be a creditor; and that he was directly affected by the judgment.

In *Latham v. Lawrence*, 6 *Halst.* 322, decided in 1830, the judgment was entered on a bond and warrant, dated July 7th, 1827. The affidavit stated that the true consideration of the bond was a note, dated October 18th, 1823, for \$120, payable to Latham six months after date, with interest; another note, dated April 2nd, 1825, for \$90, payable to Latham four months after date, with interest; both of which notes were drawn by the said Lawrence; and also for a book account against the said Lawrence, amounting to \$128.54; and that the debt for which the judgment is confessed is justly due and owing; and that the judgment is not confessed to answer any fraudulent purpose, or to protect the property of the defendant from his creditors.

On motion of judgment creditors of Lawrence, the judgment was set aside for defective affidavit.

Ch. Just. Ewing said the affidavit kept the word of promise to the ear, but broke it to the hope.

In *Hoyt v. Hoyt*, 1 *Harr. Rep.* 139, decided in 1837, it ap-

peared that a part of the consideration was the plaintiff's promissory note advanced to the defendant, to be used, and which was actually appropriated in payment for certain chattels by him bought, and agreed beforehand to be paid for, in part, in this way. The consideration stated in the affidavit was money lent. Justice Ryerson said the question was, whether the advance of a promissory note payable at a future day was equivalent to an advance of cash, and to be treated as such in law proceedings. He said that if an advance of a note may be treated as an advance of cash, the money may be considered as justly due, if by the contract of parties it was made due and payable on demand. That he saw no objection to giving a judgment to a party in payment of his negotiable paper not yet arrived at maturity. This remark must be taken as being made with reference to the facts of the case, and as meaning if it be shown that the paper was given to a third person for something received by the defendant in the judgment. It cannot mean that A may borrow B's note and keep it himself, and confess a judgment to B for the amount of it. If that could be done the Statute might as well be repealed.

He said he was not entirely satisfied with the result to which he had arrived.

Ch. J. Hornblower overcomes the difficulty in his own mind by saying that it was admitted that the understanding and agreement of all the parties was that the plaintiff was to pay, as he has paid, the debt for which the note was given. But the validity of the judgment, or the sufficiency of the affidavit at the time the judgment was entered, cannot depend upon whether the plaintiff afterwards pays the note or not. He may not pay it, or he may pay it out of the very money which he raises by the sale, under the judgment, of the defendant's property ; in which case the money was never at any time due him. Suppose he becomes insolvent and fails to pay his note, shall the defendant in judgment pay it twice? The Legislature never contemplated leaving the door open to such hazards, and to the frauds which would result from the latitude some seem disposed to take with the language of the statute. This case decides, and with great hesitation, that if A gives

his note to B, and B endorses it to another and gets goods for it, he may confess a judgment to A for the amount of it before it becomes due and payable by A.

But the case of a judgment confessed by A to B, to-day, because B has endorsed A's note, payable three or six months hence, is a very different case.

It is an abuse of language to say that because I endorse your note to-day, payable three months hence, to be used by you, you are indebted to me to-day for the amount of it; and that it is a debt due and owing to me to-day.

No such idea was ever entertained by the courts; it would encourage all manner of device to cheat the plain design of the statute.

This review of the decisions in our Supreme Court on this statute shows that the affidavit must make out a debt existing at the time of the confession of the judgment; and that if the facts stated in the affidavit show that there was no existing debt, the allegation in the affidavit that the debt is due and owing amounts to nothing. And indeed the object of the statute could not be attained if the plaintiff's opinion that the facts sworn to make him a creditor *in presenti* was suffered to sustain the judgment.

Next, on whose application may a judgment confessed and entered without the proper affidavit be set aside?

One of the judgments in this case is confessed by Andrew Rankin, one of the firm, for his individual debt, to Elias Plum. Another is confessed by George H. Lee, the other partner, for his individual debt, to Caroline Hayden. And executions on these debts have been levied on the property of the firm.

In *Moody* against *A. and H. Payne*, 2 *John. Chan. Rep.* 588, 9, a bill was filed for an account of the partnership concern, after a dissolution, stating a number of existing debts against the partnership, and its insolvency; and to enjoin a sale at law under a judgment confessed by one of the partners for his separate debt, due the other partners, and under which judgment partnership

property had been seized. The injunction was allowed. The answer denied the insolvency, and some of the partnership debts, and admitted others. On motion to dissolve Chancellor Kent dissolved the injunction. He says, that the execution at law only takes the interest of the partner who is sued, subject to the partnership debts; that there are difficulties in selling such an uncertain interest before it is ascertained, by taking the accounts in this court, what is the interest to be sold. That Lord Eldon felt the weight of that difficulty, &c.; and that he did not know that this court had ever undertaken to stop an execution at law in such a case, &c. That the cases referred to by Maddock do not warrant the conclusion that chancery stops such executions by injunction. That courts of law are in the constant practice of awarding executions in such cases; and that chancery does not, ordinarily, and upon such general grounds, enjoin the sale at law.

Justice Story, in 1 *Story's Eq. Sec.* 678, refers to this decision, and dissents from it. He says that the reasons given by Chancellor Kent do not seem a sufficient ground on which such an injunction is to be denied. That if the debtor partner, on a final adjustment of the accounts, will have no interest in the partnership funds, and the other partners have a lien upon the funds, not only for the debts of the partnership, but for the balance ultimately due to them, a sale may most materially affect their rights; for it may be extremely difficult to follow the property into the hands of the various vendees; and their lien may perhaps be displaced, or other equities arise by intermediate *bona fide* sales of the property by the vendees, to other purchasers without notice; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees. That, to prevent multiplicity of suits, and unpardonable mischiefs, and to insure an unquestionable lien (the lien he has before spoken of for the debts of the partnership), it would seem perfectly proper, in a case of this kind, to restrain the sale. And this, he says, seems, notwithstanding the doubts suggested by Chancellor Kent, to be the true result of the English decisions on the subject, which do not distinguish between the case of an assignee of a partner and that of an executor or administra-

tor of a partner or of a sheriff, (meaning under a judgment against a partner ; and the vendee at the sheriff's sale would be nothing more than an assignee of the partner,) or of an assignee in bankruptcy. These views are very persuasive ; and are well calculated to remove doubts, even in the case presented in *Moody v. Payne*.

But in that case the insolvency of the partnership was denied by the answer. In this case it must be taken as admitted ; no answer having been put in. In this case, then, it is not a peradventure, but it is certain that neither has any interest in the partnership funds. And yet each partner has confessed a judgment for his separate debt ; and executions thereon have been levied on the partnership property. I cannot doubt that in such a case Chancellor Kent would have retained the injunction.

In 2 *Story's Eq. Sec.* 1253, it is said, that the partnership property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts. That a long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners ; that is to say, the partners have a right, *inter se*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has a right except to his own share of the residue ; and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts. That the creditors, indeed, have no lien ; but they have something approaching to a lien ; that is, they have a right to sue at law and by judgment and execution to obtain possession of the property ; and in equity they have a right to follow it as a trust, into the possession of all persons who have not a superior title. But in the mean time the creditors cannot prevent the partners from transferring it by a *bona fide* alienation.

See, also, 1 *Story's Eq. Sec.* 675. In the case of a judgment and execution against one partner for his individual debt, a levy can be made only on his interest, if any, in the partnership property, after the payment of the partnership debts. The sale does not transfer any part of the joint property so as to entitle the purchaser to take it away, but

the purchaser becomes only a tenant in common with the other partner. 1 *Story's Eq., Sec.* 677. In an ordinary case, therefore, the sale by the sheriff might work no injury to the creditors of the partnership. But when each partner confesses a judgment, and executions are issued and levied on all the interest of each partner in the partnership goods, and the partnership goods themselves are advertised to be sold, not the interest of the respective partners therein after paying the debts of the firm, it is manifest that the intention is that the goods shall be delivered to the purchasers; and it being a case where the firm itself is insolvent, it is manifest that the interest of the creditors of the firm will be sacrificed; and there being no partner left to represent the interest of the partnership creditors through whom they can assert their interests, it seems to me an extraordinary proposition that the creditors of the partnership have no means, and the courts no power to prevent such a sacrifice. 1. *Barbour*, 480.

The affidavit of the consideration of the judgment of April 8, 1848, for the penal sum of \$20,000 in favor of Wm. Lee, against Andrew Rankin and George H. Lee, states the consideration to be "to secure certain promissory notes which the said Wm. Lee had endorsed for the accommodation of Rankin & Lee, as follows;" and then states first, certain notes "given by the said Lee; next, a bond and mortgage executed by the said Wm. Lee to Samuel Cook, for \$1675, given upon land of the said Wm. Lee, dated May 29, 1845, which money was then and there lent by Saml. Cook to Rankin & Lee, \$1675 00

And, after stating other matters, states one joint note of Andrew Rankin, Wm. Lee, Alfred and George H. Lee, to Saml. Cook, for \$650 00, dated Dec. 9. 1845, 650 00

The bill states that in May and Dec. 1845, when the said bond and mortgage, and the said joint note above mentioned were given to Saml. Cook, the firm of Rankin and Lee consisted of the said Andrew Rankin and William Lee himself. . . . If this be true, and for the present inquiry I must take it to be true, there is nothing in the case to show how the present firm of Rankin and Lee, (composed of Andrew Rankin and George H. Lee), is liable for these sums of \$1675 and \$650.

If it be said that George H. Lee, of the last firm of Rankin and Lee, also signed the bond and warrant to confess this judgment, it may be answered that if he knew that these matters were to be included in the judgment, it presents a very suspicious state of things; and among the surmises that might be made in reference to it, perhaps not the least probable is, that though this young man, the son of Wm. Lee, became nominally the partner, instead of his father's name being continued, yet that the father was really, and so far as capital was concerned, the partner; and if so, the whole matter of these judgments confessed to Wm. Lee is an attempt to withdraw his capital, perhaps the only capital on which the partnership business was done, from responsibility for the partnership debts. It may be further remarked, that if George H. Lee was really as well as nominally the partner, and that if he knew and consented that these matters should be included in the judgment to Wm. Lee, it could only be with some ulterior and fraudulent design. I cannot consider a judgment for this part of the consideration stated as standing on any better ground than a judgment confessed by one partner for his separate debt.

Another item of the consideration of this judgment as stated, is Andrew Rankin's note endorsed by Wm. Lee, due July 28, 1848, for - - - - - \$396 69

This is subject to the same remarks, and must also be considered as a judgment for the separate debt of Andrew Rankin.

Then there is a judgment confessed by Andrew Rankin and Geo. H. Lee, partners to Wm. Lee, a part of the consideration of which is, "notes given by Wm. Lee," none of which was due, \$3085 00

Another part, business paper of Alfred Mead, a good man, as the bill states, endorsed by Wm. Lee, and not due, 1460 00

Another part, notes of Rankin and Lee, endorsed by Wm. Lee, and not due, 3475 00

And the other part of the consideration stated is, at best, the separate debt of Andrew Rankin, 2721 69

And a judgment confessed by Andrew Rankin alone, and of course for his separate debt, for 298 28

And a judgment confessed by George H. Lee alone,
and of course for his separate debt, for 143 25

The quasi lien of the creditors of a partnership on its property, as against creditors of individual members of the partnership, gives this court jurisdiction for the purpose of protecting the creditors of the partnership.

Story, supra, 1, Barbour, 480.

The judgment in favor of Lee, if bad in part, would, at law be set aside altogether.

This court is not called upon to divide it, and let it stand for part, and let a sale be made under it in part; but might, in the progress of matters in this court, deal with its different parts according to equity.

On the same day, another judgment was confessed by Rankin and Lee to Wm. Lee, for \$5000, the consideration for which, as stated in the affidavit, is to indemnify him against loss and damage by reason of his having endorsed a large amount of business paper, notes and bills of exchange of the said Andrew Rankin and George H. Lee, to enable them to get their bills and notes discounted and passed away, amounting in all to \$17,398 44, whereof \$3,253 13 is past due, and has not been paid.

This, as I understand it, is for business paper made by other persons, payable to Rankin and Lee, and on which Wm. Lee endorsed his name to aid them in getting the paper discounted. And on this state of things, and without having paid \$1, he makes affidavit that \$5000 is due to him. It does not even appear that any of the paper was discounted; and if it was, and if he had been fixed as endorser, the makers of the notes, who may be all good, for aught that appears, would, on his paying the paper, be liable to him. It cannot be expected that the court will permit Mr. Lee to proceed on such a judgment as this, to withdraw the partnership property from the partnership creditors.

It seems clear to me that the intention of the parties to these proceedings has been to effect, by means of judgments, an assignment of all the partnership property, to the exclusion of the partnership creditors. Such an assignment is void, by statute.

The injunction will be dissolved as to the judgment and

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execution of Elias Plum against Rankin & Lee, for \$795-51; and as to the judgment and execution of Caroline Hayden against Rankin & Lee for \$206; and as to the sale of the separate property of Andrew Rankin under the judgment and execution of Elias Plum against them; and as to the sale of the separate property of George H. Lee under the judgment and execution of Caroline Hayden against him. As to all the other judgments and executions, the motion to dissolve the injunction is denied.

Order accordingly.

CITED in *Clapp v. Ely*, 3 *Dutch*. 592; *Young v. Frier*, 1 *Stock*. 406, 468.

PETER M. RYERSON vs. JAMES BOORMAN and others.

On a foreclosure bill, a general decree for the sale of all the mortgaged premises had been taken, and a *fi. fa.* for sale issued thereon; and the Sheriff had struck off the whole property at one bidding, for \$15,000. Before a deed was given by the Sheriff, the defendant in the decree and execution filed a bill, stating that the property was worth \$60,000, and consisted of distinct tracts; and, also, that a mistake had been made in the newspaper advertisement by which the descriptions of the different tracts were erroneously given; and prayed an order directing the Sheriff not to deliver the deed. The order was granted; and the sale was subsequently set aside, and an order made that the property be sold in parcels, if the defendant in the decree and execution so requested.

The bill, filed October 1847, states that on the 10th of August 1839, James Boorman, John Johnson, Daniel Ayres and Adam Norrie transferred to Peter M. Ryerson, the complainant, \$17,500 of the stock of the North America Trust & Banking Co., of New York, at par value; that the complainant then gave them a bond and mortgage to secure the said sum and interest; and that, on the 21st October, 1839, they transferred to the complainant \$5,000 more of the said stock, at par value, and the complainant then gave them another bond and mortgage to secure the last mentioned sum with interest; both mortgages covering nearly the same property.

That the said Boorman, Johnson, Ayres and Norrie, on the 1st of July 1844, filed their bill to foreclose the said two mortgages; that the complainant thereupon employed counsel to defend the said suit, being advised and believing that he had a good defense, and that the said bonds and mortgages were invalid; that while said suit was pending he entered into negotiation with the said complainants therein to settle the said difficulties in an amicable manner; that, pending these negotiations, he delayed putting in his answer to the said bill in consequence of this negotiation, and that he was surprised by hearing that a decree had been taken in said suit by default, on the 2d day of April 1845, for \$27,727.24, that being the full amount of the said principal and interest on the said two bonds and mortgages, and that execution had been issued on the said decree.

Ryerson v. Boorman.

That he thereupon, shortly afterwards, saw Mr. James Boorman, one of the said complainants, who in consideration of the premises agreed, on the part of the said complainants, with him, Ryerson, to the purport and effect following, that is to say : that the whole claim of the complainants should be reduced to \$20,000 ; that this sum should be paid in instalments as follows : on the 1st of July 1846, \$1,000 and the interest on \$20,000 for six months ; on the 1st January 1847, \$1,000 and the interest on the balance of the \$20,000 remaining unpaid ; on the 1st of July 1847, \$1,000 and the interest on such balance ; on the 1st of January 1848, \$500 and interest on such balance ; on the 1st of July 1848, \$500 and interest on such balance ; on the 1st of January 1849, \$500 with interest on such balance ; on the 1st of July 1849, \$500 with interest on such balance ; which would then reduce the amount to \$15,000 ; and that this last sum should, upon payment of the interest thereon semi-annually, remain as a permanent debt during the life-time of the said Boorman, if he, Ryerson, should desire it ; and that he, Ryerson, should pay the costs of the said suit and a counsel fee of \$20 to the solicitor of the said complainants in their said suit, and the costs of the Sheriff who had the said execution.

That the said Boorman then reduced the said agreement to writing, by addressing a letter which he then wrote in his, Ryerson's, presence, to Mr. Ogden, the solicitor of the complainants in their said cause, stating the substance of the said agreement, except that part relating to the sum of \$15,000 not having to be called for, &c.; that being a voluntary offer on the part of said Boorman.

That in consequence of this agreement he, Ryerson, did not proceed to get the said decree opened and to set up the said defence to the said bill.

That ever since the making of the said agreement the said complainants have treated the said debt as a debt of \$20,000 ; that they balanced their books, leaving this sum as the debt due ; and that he, Ryerson, has since paid the interest on the said sum of \$20,000 to January 1, 1846, he having agreed to pay such interest ; and that this interest was received by the said complainants in full for the interest on the said claim ; that he, Ry-

erson, has also paid to the solicitor of the complainants his taxed costs in the said suit and his counsel fee of \$20, as agreed upon; and that he has also paid to the Sheriff his costs on the said execution, calculating his per centage upon the said sum of \$20,000; that the said complainants directed the said Sheriff to desist from selling, and he thereupon desisted. That by reason of said agreement made to settle the said law suit, and reduced to writing as aforesaid, and in part performed as aforesaid, the said decree ought to have been credited so as to reduce the amount to \$20,000, as agreed upon, and to have the said amount payable in instalments, at the several times agreed upon.

That the property covered by the said mortgages consists of nineteen different tracts of land, (stating them).

That, the said sum of \$20,000 being agreed to be paid in instalments, he is advised that it should have been referred to a Master to see what amount was due the complainants, and that a part only of the mortgaged premises, sufficient to pay the amount so reported to be due, should have been decreed to be sold; and that the said complainants ought not to have sold the whole of the said mortgaged premises, inasmuch as only a part of the said \$20,000 was then due and payable.

That the Sheriff of Passaic advertised the mortgaged premises to be sold under the said decree and execution, and adjourned the sale to October 15th, 1847; and that he, Ryerson, called on the said Sheriff the day before the said sale, to know for what amount he intended to sell the said property, and the said Sheriff answered that he intended to sell the same for the full amount of the debt, interest and costs, as directed by the said execution. That, on the said 15th of October, the said Sheriff sold the said 19 tracts under the said execution; and that one John T. Johnson bid for the said 19 tracts \$15,000; and that no other bid was made; and that the property was struck off to him for that sum. That the said J. T. Johnson attended the said sale as the agent of the said complainants, and gave directions as to the sale; and that he, Ryerson, believes that the property was bought for the said complainants; that the deed has not yet been given, but is to be given on the 1st day of November next.

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That the property was advertised for sale by the Sheriff in the Paterson Intelligencer, and that the description of the 15th lot is not correctly given, but contains a part of the 15th lot and a part of the 19th lot also; that the description of the 16th lot is not correctly given, but contains a part of the 16th lot and a part of the 19th lot; that the description of the 19th lot, being the 3000 acre lot, is altered and wrongly placed in seven different places in the said advertisement, so that no sense can be made of it, as by reference to the said newspaper will appear; and that the advertisement for the sale of the said property was not inserted in any other newspaper.

That these tracts of land are so situated that most of them could be sold separately; the first five tracts being more than four miles distant from the other tracts; that he is advised and charges that the sale of the whole of this property, consisting of 19 different parcels, and containing in all 4490 acres, at one bidding, was illegal; that it ought to have been sold in parcels; that a sale as made would prevent any person from bidding except a man of very large property, and would sacrifice the interest of the complainant, especially as the apparent claim of said complainants was very large. He charges that the property so sold by the Sheriff is worth \$60,000, and that the sale for \$15,000 was a sacrifice of the property; that the mistakes in the said advertisement affect the whole sale, inasmuch as but one bid was made for the whole property.

The bill prays that the decree may be vacated, to enable him to prove and establish their said agreement, and to ascertain the amount due on the said bonds and mortgages; or that the decree should stand only for the amount agreed to be due thereon as aforesaid, and also to ascertain how much is due and payable; and that execution should only issue for the amount that shall be due and payable; and that, in the meantime, the bidding be opened, and the Sheriff be directed not to deliver a deed to the said Johnson; and for further relief.

On this bill an order was made directing the Sheriff not to deliver the deed until the further order of the Court.

On the 25th of January, 1848, the defendants Boorman, John-

son and Ayres put in an answer. They say that they, with the defendant Norrie, on and prior to August 10, 1839, were partners, in the city of New York; but that prior to September 12, 1845, the said firm went into liquidation; and that Norrie is now and for some time past has been in England. They say that, the complainant being indebted to the said firm in \$12,500 for the purchase of machinery &c. of a steam rolling mill, and in \$17,500 for money agreed to be lent and advanced by them to him, of which sum of \$17,500 \$1,000 had been lent and paid to the said complainant on the 25th of November previous, and the further sum of \$12,000 was paid to him in cash and notes equal about to money (discount being allowed) on the 4th of December following, and in conformity with the terms of the agreement in the premises, the remaining sum of \$4,500 necessary to make up the said amount of \$17,500 was retained to be paid thereafter, when certain improvements should be made on the property mortgaged as hereinafter mentioned; the complainant being indebted as aforesaid, on the 1st December 1837 executed and delivered to them his bond conditioned for the payment of \$30,000 and interest and to secure the payment thereof, executed, with his wife, at the same time, and delivered to them a mortgage for that amount on property in Passaic county, New Jersey, called the Forge lot, upon which the said machinery was to be erected, and on a part of another lot called the Post farm. That afterwards, the said Ryerson, being desirous of effecting a large loan from other parties on the said property, applied to the defendants to change the security for their said claim, and to give up the said mortgage to be cancelled, and proposed to place in their hands stock of the North American Trust & Banking Company as their temporary security, in lieu of the said mortgage, and such proceedings were had on his said application that, on or about December 6, 1838, the said Ryerson transferred to them 350 shares of the stock of the said Trust & Banking Co., of which 300 shares were to be held by them as collateral security for his indebtedness to them, in lieu of the mortgage security surrendered, and in no other manner, and the remaining fifty shares were included in the transfer for the temporary convenience of the said Ryerson, and were at his request

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transferred, on or about the 9th of January following, to one Wm. Boeraem; whereupon they cancelled the said mortgage, and gave it up to Ryerson to be cancelled of record; that the said 300 shares of the said stock remained in the names of the defendants till the 28th of August following, when Ryerson, having executed and delivered to them another bond for \$17,500 and a mortgage to secure the same, dated the 10th of August preceding, 75 shares of the said stock were transferred to the said Ryerson, and it was agreed to transfer and surrender, 100 shares more of the said stock when certain judgments and a prior mortgage on the property mortgaged to them should be paid off; which 100 shares were transferred to Ryerson on or about the 7th of September following; and on or about the 21st of October following, (1839,) Ryerson executed and delivered to the defendants another bond of that date, for \$5,000, with a second mortgage on the property previously mortgaged, to secure the said bond; and on the 26th of said October, 1839, he paid to them \$3,000 in cash, and \$452.37 for interest that had accrued on his indebtedness to them; thus reducing the said indebtedness to \$22,500, the amount of the said bonds last mentioned; whereupon the defendants transferred to Ryerson the remaining 125 shares of said stock which had been held by them as collateral security for such indebtedness. They say that the two bonds and mortgages stated in Ryerson's bill of complaint were given to them as security for so much of the original debt as remained unpaid, and upon no other consideration; and that the stock referred to in his said bill was the stock of Ryerson, held by them as aforesaid as collateral security for his said indebtedness to them, and in no other manner.

That the said mortgages not being paid, they filed a bill to foreclose, &c.; that in or about October, 1844, Ryerson and his wife filed a demurrer; that in January, 1845, the said demurrer was overruled; that in April, 1845, a decree *pro con.* was taken in default of answer, and a final decree for sale, to satisfy and pay \$27,727.25, the principal and interest due on the said mortgages; that on or about May 2, 1845, a *fi. fa.* was issued to the Sheriff for the sale of the said premises.

They deny that Ryerson had any good defense to make in the said suit, or that while the same was pending he ever pretended to them or any of them that he supposed he had any defense to make, or that he ever entered into any negotiations with them or with Norrie to their knowledge or belief, to settle any pretended difficulties ; or that anything transpired between them to delay or interfere with him in putting in an answer to their bill. And the defendant Boorman denies that pending the proceedings for foreclosure he ever entered into any negotiation with Ryerson for suspending such proceedings in any manner, or gave Ryerson any reason to believe he would do so, other than as follows, to wit : on or about March 25, 1845, Ryerson called on him at his counting-room in New York, and proposed a compromise of the claim above mentioned on the ground of his inability to pay the whole ; that this defendant then offered that, provided Ryerson would immediately pay the interest due from February, 1844, with the costs which had been accrued, he would give directions to his solicitor to take a decree for \$20,000 only, believing from the representations of Ryerson that the property mortgaged would not sell for more than that amount with interest and costs ; and did further offer to allow Ryerson five years to pay the said amount, the interest thereon being paid semi-annually, and \$1,000 a year on account of the principal ; which arrangement Ryerson promised to fulfil ; but he utterly failed to pay the interest due, and costs, or any part thereof ; therefore no instructions were given by this defendant to his solicitor to suspend proceedings, or to take a decree for less amount than the whole of the claim.

That the premises were advertised to be sold on the 6th of October, 1845.

Boorman says that, on or about September 12, 1845, Ryerson again called on him and made certain other propositions respecting the payment of said mortgage claim and decree, to prevent a sale of his property, which this defendant, in behalf of the parties in interest, not wishing to purchase the property, agreed to accept if the arrangement should be completed on or before October 1, 1845, and that thereupon he wrote to Mr. Ogden, their solicitor, as follows :

“Mr. P. M. Ryerson has made a proposition to us to preclude a sale of his property under mortgage to us, and we are inclined to accede to it if the arrangement is completed on or before the 1st of October. It is as follows: that he shall, before that period—

1st. Repay you the amount we have paid you for taxed costs and counsel fees, and any other costs incurred and counsel fees due you.

2d. That he shall pay you interest on the sum of \$20,000 from February 1, to August 1, \$600
and \$500 in reduction of the assumed principal of \$500
\$20,000, \$500

making \$1100

to be paid you for remittance to us free of charge. These payments being made, we are willing that you shall, as our attorney, enter into a stipulation for us that, on the payment as follows of the further sum of \$19,500, with interest semi-annually from the 1st of August last till paid, we will discharge him and release the property mortgaged to us. The understood periods for the payment of the said assumed principal sum of \$19,500 are: \$1,000 on the 1st of February next; \$1,000 on the 1st of August next; \$1,000 on the 1st of February, 1847; \$1,500 in semi-annual payments of \$500 each till the assumed principal is reduced to \$15,000.

“This stipulation is given with a reservation of all due rights under the mortgages and decree of sale, provided the stipulated payments of interest and on account of principal are not regularly made to us in New York.

“Mr. Ryerson has further to pay fire insurance on the house for one year, per memorandum subjoined, which we have paid and which has not been included in the decree, and also to pay fire insurance annually on \$3,000 on the buildings insured, till the whole debt is cancelled.

“If you see any legal obstacle or objection to the arrangement tending to invalidate our security on the property, these propositions fall to the ground; otherwise you can carry them into effect, and suspend all further proceedings other than such as are necessary to keep our security alive.”

Boorman denies that the said proposition was made or entertained upon any allegation on the part of Ryerson that the mortgages were invalid, or that he should apply to the court to open the decree and permit him to defend on the merits of the cause ; and he also denies that the principal of \$20,000 was assumed upon any such consideration ; but says that, some time before the said proposition was made by Ryerson, the amount of that asset was separated by those interested therein, and was transferred to two accounts ; \$20,000 thereof to the account of debts considered good beyond a question, and the balance, which then stood at \$6091,42, to an account of debts considered doubtful ; and that such apportionment was not based upon any idea that the bonds and mortgages could be impeached, but upon their belief that the premises would not yield more than \$20,000 ; and that they have made no alterations in the accounts since the aforesaid proposal was made by Ryerson.

That Ryerson did not make any payment whatever on or before the said October 1, 1845 ; that the sale was adjourned to November 6, 1845, and from time to time till the 14th of Feb'y, 1846 ; and that in the latter part of January, 1846, as he is informed by his solicitor, and therefore admits, Ryerson paid up the costs and counsel fees and insurance and Sheriff's costs, and also \$1100 on the debt. That Ryerson then urged his inability to pay the \$1,000 principal which he stipulated should be paid on the 1st of February, 1846, and asked for further time ; and thereupon this defendant applied the sum of \$1100 so received from Ryerson to the payment of the interest on \$20,000 for eleven months, up to the first of January, 1846, and consented, by a letter written to Mr. Ogden, to receive \$1,000 of the principal on the 1st of July, 1846 ; \$1,000 on the 1st of January, 1847 ; \$1,000 on the 1st of July following ; \$500 on each of &c., and the balance of the assumed principal of \$20,000 on the 1st of July, 1850, and interest semi-annually on the 1st of July and January in each year.

The defendants say that no agreement was ever entered into by them with Ryerson, nor by Mr. Ogden on their behalf, other than the letters of instruction before referred to. That Ryerson failed to pay any principal or interest on the 1st of July 1846 ;

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that in November, 1846, no further payments having been made, they instructed the Sheriff to sell; that in February, 1847, they passed the management and agency of the said claim into the hands of the defendant John T. Johnson, who has since that time had the control and direction thereof. That after the property was re-advertised, Ryerson applied for postponements upon promises to make payments on account; but without pretending that he was entitled to have the decree opened or corrected, or that a part only of the mortgaged premises should be sold to meet the payments he had neglected to make semi-annually.

That they are informed by the defendant J. T. Johnson, and believe, that Ryerson applied to him from time to time, after he took management of the case, for further adjournments, and that the sale was frequently postponed, with his consent, upon Ryerson's assurances that he would make payments on account of the execution; but that he paid no money except \$200 in March last; and that in the communications between Ryerson and the said Johnson, Ryerson did not pretend that there was any existing agreements between him and the defendants for a reduction of the decree, or for deferring the payments; but on the contrary, that he made various and repeated new proposals to said Johnson to obtain time to discharge the amount due on the said decree.

They admit that, after the mortgaged premises had been correctly advertised in the newspaper for several insertions, by some accident or mistake on the part of the printer, or through some other means, transpositions occurred whereby the descriptions of some of the lots became intermixed with others and confused; but they say they are credibly informed and believe that the advertisements from which the Sheriff read the descriptions at the day of sale was correct; and that there was no suggestion or complaint made by the complainant, or any other person, at the sale, that the advertisement in the newspaper was confused or unintelligible. That the complainant Ryerson and his counsel were both present when the said property was exposed for sale; that neither of them objected to the Sheriff's proceeding to sell, or stated any irregularity in the advertisement in the newspaper;

nor requested that the property should be put up in separate parcels, or that any part should be offered by itself ; but, on the contrary, that either the said Ryerson or his counsel, in answer to a question propounded, distinctly stated that Ryerson had no objections to make against the Sheriff's proceeding with the sale.

That they are informed and believe that the Sheriff did not name any sum which was to be raised by the sale ; and that they did not instruct him to sell for the costs and payments that had been made by Ryerson ; nor do they believe that the Sheriff told Ryerson that he intended to sell for the said costs and payments.

That they believe the property to be more valuable together than if broken into parcels ; that it would be difficult to fix a proper and separate value on each parcel ; and that by such a sale the security of their debt would be greatly jeopardized.

On this answer, a motion was made to vacate the order staying the sale.

F. T. Frelinghuysen in support of the motion.

B. Williamson and *A. S. Pennington* contra. They cited 1 *Green's Ch.* 182, 196, 7.

THE CHANCELLOR. I think the sale should be set aside, and the property be advertised anew. As to the manner in which the property shall be sold, the like order will be made as was made by agreement of counsel for the sale of the same property in the case of the Greenwich Bank against Ryerson ; which was, that the property should be sold in parcels if Ryerson requested it.

As to the question whether the amount of the execution is to be held to be reduced to \$20,000, I will hear any testimony the parties may offer in time for the consideration of it before the property can be brought to a sale.

Motion denied.

AFFIRMED 3 *Hal. Ch.* 640.

MARGARET RUTGERS *vs.* JOSEPH KINGSLAND and others.

If a mortgage is, by mistake as between mortgagor and mortgagee, so drawn as to exclude land which they intended it should include, and the mortgage is recorded as drawn, and the lands not included in it are sold to a *bona fide* purchaser without notice of the mistake; or lands as well those included as those not included in the mortgage but intended to be, are sold together with other lands not intended to be included in the mortgage, subject to such mortgage on a part of them, to a *bona fide* purchaser, without notice of a mistake, the mistake will not be corrected as against such purchaser.

A subsequent purchaser from such *bona fide* purchaser without notice will hold the land not included in the mortgage free from the mortgage, although such subsequent purchaser knew of the mistake; because, by purchasing from him who bought in good faith without notice, he would acquire all his rights and equities.

A subsequent purchaser, *bona fide* and without notice from a first purchaser who had notice of the mistake, will hold the land not included in the mortgage free from the mortgage; because his equity would be at least equal to that of the mortgagee.

In July, 1836, Ralph Pomeroy and wife conveyed to David S. Brown, in trust for himself and certain associates, certain lands situated in the township of Belleville, in the county of Essex, containing about 33 acres, with a mill site and mill and dwelling-house thereon for \$40,000, subject to a mortgage given to Gerard Rutgers. Brown gave a bond to Pomeroy for \$12,000, part of the purchase money, payable in five years, with interest; and to secure the payment of the bond, gave a mortgage to Pomeroy on a part of the said land, particularly describing the said part by courses, distances and landmarks, and as containing six acres, be the same more or less.

In Oct., 1836, in order to relieve the property from the Rutgers mortgage, and enable Brown and his associates to sell, free from encumbrance, all the property except what the mortgage from Brown to Pomeroy covered, Pomeroy, who was in some way interested with Brown, gave to Margaret S. Rutgers, who then held the said Rutgers mortgage, and on which only \$5,000 was then due, his bond conditioned for the payment of \$5,000 in one year, with interest; and, on the same day, assigned to the said Margaret the said mortgage given by Brown to him, which assignment contained a proviso that if Pomeroy should pay to the

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said Margaret \$5000 and interest thereon according to the condition of his said bond to her, the said assignment should be void. And thereupon the said Margaret gave up the said Rutgers mortgage to be cancelled: and it was cancelled.

In March, 1838, Brown filed a bill against his associates, twenty in all, stating advances made by him in relation to the property, and that the bond and mortgage given by him to Pomeroy remained unpaid; and praying an account; and that what may be found due to him may be paid; and that the mill, fixtures and machinery, together with the land adjoining, may be sold for that purpose.

On the 19th of Oct., 1848, a final decree was made on Brown's said bill for the sale of the whole of said lands, the 33 acres, without prejudice to the interests of any person holding the said mortgage given by Brown to the said Pomeroy, to raise and pay to Brown the sum of \$15,826.01, which included the principal and interest then due on the said mortgage. A *fi. fa.* was accordingly issued; and by virtue thereof, all the said lands, the 33 acres, were sold, subject to the said mortgage, to Charles Mix, who was one of the said associates; and all the said lands were conveyed to him, subject to the said mortgage, by deed dated April 27, 1839.

On the 28th of August, 1840, Jos. Kingsland recovered a judgment against Charles Mix, for \$519.34, on which a *fi. a.* against goods and lands was issued; and on the 10th of Oct., 1840, Wm. Mix recovered a judgment against Chas. Mix for \$2867.71, on which a *fi. fa.* against goods and lands was issued. These executions were levied on all the said property described in the said deed to Chas. Mix.

In Feb. 1841, Margaret Rutgers filed her bill to foreclose the said mortgage given by Brown to Pomeroy, and by Pomeroy assigned to her, stating, that in Oct. 1836, there was \$5000 due to her on the Gerard Rutgers mortgage, and that Pomeroy gave her his bond for the said \$5000, and as collateral security therefor assigned to her the said Brown bond and mortgage; and that thereupon she delivered up the said bond and mortgage to Gerard Rutgers to be cancelled, and it was cancelled; and stating that the whole \$12,000 mentioned in the Brown mortgage was unpaid.

A decree *pro. con.* was taken. In July, 1842, leave was granted to the complainant in this suit to strike out the names of Brown and his wife as defendants in this bill.

A final decree was made in this suit for the sale of the land described in the Brown mortgage, to raise the money due thereon, to pay the complainant, Margaret Rutgers, the money due her on the bond given by Pomeroy to her, and directing that the residue of the proceeds should be paid into court. Under the execution issued on this decree, the sheriff, on the 20th of Dec., 1842, struck off the said premises to the complainant, Margaret Rutgers, for \$1000. No deed was made.

On the 18th of Jan'y, 1843, the sheriff, under the said executions in favor of Jos. Kingsland and William Mix against Chas. Mix, sold all the right, title, and interest of Chas. Mix in the said lands to Jos. Kingsland, for \$500; and thereupon the sheriff made a deed to said Kingsland of all and singular the said lots of land and premises, in as ample a manner as by virtue of the said executions he could convey the same.

On the 3d of Feb., 1843, Margaret Rutgers filed a supplemental bill, stating among other things, that Brown, in making the said mortgage to Pomeroy, (assigned to her), intended to embrace in it the dwelling-house, curtilage and appendages and other adjoining lands. That before and at the execution and delivery of the said Brown mortgage it was expressly understood and agreed that it should embrace the said dwelling-house, &c., and that it was executed and delivered by Brown and wife, and received by Pomeroy upon such intention, agreement and understanding. The bill then states what it claims to be the boundaries intended in this mortgage; and states that directions were given to the scrivener who drew the mortgage which would have embraced the said dwelling-house, &c. It states what it claims to be the mistake to be the omission of a certain course and distance; and that the said mortgage was executed, delivered and received under the mistaken idea and impression that the description therein given contained the course and distance so omitted. It states that by the extension of a certain line about two chains the next course and distance would embrace the dwelling-house, &c., so intended to be embraced. That the complainant, the

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said Margaret, accepted the said bond of Pomeroy and the assignment of the said Brown mortgage upon the representation of the said Brown and Pomeroy, and in the full belief and expectation that the said mortgage embraced the land and premises as so intended to be embraced ; and that she would not otherwise have accepted the same, or delivered up to be cancelled the said bond and mortgage to Gerard Rutgers. That Brown made and delivered the said bond and mortgage to Pomeroy with the full knowledge and consent of the said Chas. Mix and others for whom Brown held the said lands in trust ; and that the said Chas. Mix knew, when the said bond and mortgage were given to Pomeroy, that it was intended, agreed and understood by and between Brown and wife and Pomeroy that the said mortgage should embrace the said lands and premises so including the said dwelling house, &c. This bill then states the said bill filed by Brown in 1830, to which the said Mix was a defendant ; that the said bill stated that the said mortgage embraced the said dwelling-house and its appurtenances ; and that the said Charles Mix well knew it so alleged. It states the decree in that suit, and the execution issued thereon, and the sale to the said Charles Mix. That Charles Mix, when he bought at that sale, knew that the said decree and execution recognized and stated that the mortgage to Pomeroy was a lien on the said dwelling-house and appurtenances ; and that Mix has often declared that it did so.

This bill then states the judgments and executions of Jos. Kingsland and William Mix against Chas. Mix, under which levies were made on the said land and premises so conveyed as aforesaid to Chas. Mix, (except such parts thereof as the said Chas. Mix had sold and conveyed before the recovery of the said judgments,) subject to the lien of the Brown mortgage ; and the sale of the said lands, except as aforesaid, to Jos. Kingsland ; and that the land embraced, or intended to be embraced in the said Brown mortgage, was included in the land so sold to Kingsland.

It states that Kingsland and William Mix well knew, had heard, and had reason to believe, when their said judgments were entered and their executions issued, and when the said lands were advertised and struck off, and before the deed to

Kingsland was delivered, that the said Brown mortgage embraced, and that it was intended, agreed and understood to embrace the said dwelling-house, &c.

That this complainant, (Margaret Rutgers), was informed of the mistake in the said Brown mortgage, for the first time, after the said land and premises had been struck off to her under the said execution in her behalf issued out of this court; and that neither she nor Pomeroy, Brown and wife, Kingsland, Charles or Wm. Mix, or any other person, to the knowledge of the complainant, had any idea or impression that any such mistake as assigned had been made in the said Brown mortgage; or that the said dwelling-house, &c., were excluded or excepted from the lien thereof, until the decree of this court in favor of this complainant and the advertisement under the execution issued thereon.

That, immediately after the said mortgaged premises were so struck off to the complainant, she was informed that the said Chas. and Wm. Mix and J. Kingsland set up and pretend that the said mortgage does not embrace the said dwelling-house, &c.

The bill prays that the lands and premises so intended, agreed and understood to be embraced in the said Brown mortgage may be sold for the payment of such sum as may be due her the said Margaret, and for foreclosure, &c.; and that the decree and execution already made in this suit, and the sale thereunder, may be set aside and for nothing holden, or that such further decree as &c., may be made, instead of the decree already made; and particularly that this court may, by its decree, ascertain, determine and define the land and premises so intended, agreed and understood to be embraced in the said Brown mortgage; and that the mistake before set forth may be corrected, and for further relief.

Jos. Kingsland put in his answer to the bill.

He therein says that he has been informed and believes, that an execution issued on the decree on the original bill of the complainant and that the sheriff advertised the said mortgaged premises for sale, and on or about Nov. 28, 1842, the said premises were struck off by the sheriff to the complainant, for \$1000, she being by her agent the highest bidder.

That he is informed and believes and expects to be able to prove that the said agent of the complainant knew or was informed, before the said sale, that the said dwelling-house, &c., were not included in the said mortgage.

He denies that when his judgment was entered against Charles Mix, or when execution was issued thereon, he knew, or had been informed, that the said mortgage assigned to the complainant embraced or was intended, agreed or understood to embrace the said dwelling-house, &c.; nor had he any information that such a claim was made or intended to be made until the day of sale by the sheriff, when he made his purchase as aforesaid, and after the premises were struck off to him. That he does not know or believe that the said Wm. Mix, who is the partner of the said Chas. Mix, prior to the said purchase by this defendant, had any knowledge or notice that the said dwelling-house, &c., were intended or agreed or understood to be embraced in the said mortgage.

That he is advised and insists, that he is well entitled to have and claim as against the complainant the said dwelling-house, &c., and all the interest and estate of the said Chas. Mix, not included in the premises described in the said mortgage, which were purchased by him at the said sheriff's sale, and to hold the same by virtue of his said purchase and deed. And he insists that the said dwelling-house, &c. claimed by the complainant are not included within the premises described in the said mortgage, and that the said mortgage is no lien thereon, and also that the said house and adjoining lands are free and clear from all the mortgages in the said supplemental bill mentioned to be held by Gerard Rutgers at the time of his death, they having been cancelled of record, at or about the time the said Brown mortgage was given to Pomeroy; and ought not now to be set up to injure and defraud this defendant as against him, because he had no knowledge or notice prior to his said purchase and sheriff's deed of any pretended or alleged mistake in the said mortgages.

The cause was heard on the pleadings and evidence.

A. C. M. Pennington and *W. Pennington* for the complain-

ant. They cited 1 *Story's Eq. Jur.*, sec. 165, 411, note, 416; 2 *Ib.* page 1502; 2 *Fonbl. Eq.*, 414, 417.

R. Van Arsdale and *A. Whitehead* for the defendants, cited 1 *Story's Eq.* sec. 144, 146, 152; 1 *Ves. Sen.*, 318; 8 *Bingham*, 244; 21 *Eng. C. L.* 288; 1 *Fonbl. Eq.*, Ch. 3, sec. 3; *Sugd. on Vend.*, 42; *Elm. Dig.*, 87, sec. 40; 4 *Halst. Rep.*, 193; *Halst. Dig.*, 627; 1 *Story's Eq.*, sec. 403, 409, 410; 10 *Wend.*, 180; *Greenl. Ev.*, 315; 10 *Mass. Rep.*, 244; 1 *Ib.*, 68; 3 *Wils.*, 276; 12 *John. Rep.*, 427; 1 *Caines Rep.*, 358; 1 *Ves. Jun.*, 141; 2 *Bro. Ch.*, 219; 4 *Ib.*, 514; 7 *Ves.*, 217; 1 *John. Ch.*, 279, 425; 3 *Paige's*, 94; 1 *Ves. and Beam.*, 378.

THE CHANCELLOR. If a mortgage is by mistake, as between a mortgagor and mortgagee, so drawn as to exclude lands which they intended it should include, and the mortgage is recorded as drawn, and the lands not included in it are sold to a *bona fide* purchaser without notice of the mistake; or lands, as well those included as those not included in the mortgage but intended to be, are sold together with other lands not intended to be included in the mortgage, subject to such mortgage on a part of them, to a *bona fide* purchaser without notice, the court could not, I think, as against such a purchaser, correct such a mistake.

✧ A subsequent purchaser from such *bona fide* purchaser without notice would hold the lands not included in the mortgage free from the mortgage, although such subsequent purchaser knew of the mistake; because, by purchasing from him who bought in good faith without notice, he would acquire all his rights and equities. ✧

A subsequent purchaser *bona fide* and without notice from a first purchaser who had notice of the mistake would hold the lands not included in the mortgage free from the mortgage; because his equity would be at least equal to that of the mortgagee.

To apply these principles; if Charles Mix had no notice of the mistake when he bought under the decree of Brown against Mix and others, the complainant cannot succeed in any event. Had he such notice? It is contended that as he was one of the

associates for whom Brown, the mortgagor, acted as trustee and as president of the association, he is, therefore, chargeable with the same knowledge Brown had that certain other land was intended to be covered by the mortgage. I have strong doubts whether this position can be maintained. Actual notice is the notice required. I do not see that his being one of a number of associates interested in the property is sufficient to charge him with actual notice that certain other land was intended to be included in a mortgage given by the trustee who held the title for the associates. The property was advertised to be sold, at public sale, under a decree of this court. The mortgage was on record. It was a sale at which any person might buy, and at which the property might be sold free from any objection or influence growing out of a mistake as to the quantity included in the mortgage; for no means were taken to apprise the public, at that sale or before, of any mistake in the mortgage. Clearly, if, under such circumstances, property be sold to a person having no knowledge of the alleged mistake in the mortgage, he would hold free from the mortgage. If the case is to turn on the ground that the purchaser at that public sale was Charles Mix, one of the associates, and on the ground of his having notice, the proof of such notice should be full and unequivocal. Now the most that can be said as to notice by him is, that he supposed that the mortgage covered the additional land claimed under it; for, knowledge of what is said to be the mistake in the mortgage was not, it seems, discovered by any body till long after this public sale at which Chas. Mix bought the property.

But the mortgage was recorded. Mix, as well as all others who thought of purchasing at the sheriff's sale, must be supposed to have examined the record, to see what the mortgage covered. The mortgage had been given two and a half years before. No mistake in it had been set up by the mortgagee. And Mix was at liberty to suppose that the mortgagee knew what the mortgage covered. Certainly, in reference to all bidders not connected with the transaction and having no actual notice, the property was to be sold subject only to the mortgage as it appeared on record.

And if Mix, before examining the records, supposed that the mortgage covered the dwelling-house, yet, when the record informed him it did not, his former supposition would not charge him with a notice of a mistake in the mortgage; nor with notice or knowledge that the omission of the dwelling-house in the mortgage was made under such circumstances as would call for a reform of the mortgage as against a purchaser at that sale.

If the case made by the proofs and the principles applying to it could carry us beyond this, the next question would be, whether notice to Kingsland was necessary, and if so, at what time notice to him was necessary. He bought the property at sheriff's sale on executions against Charles Mix.

It was contended, that it was not necessary that Kingsland should have notice, he being only a judgment creditor in one of the judgments under which the land was sold to him at that sale; and that, if notice to him was at all necessary, notice at any time before the property was conveyed to him by the sheriff was sufficient

This involves the construction of Sec. 5 of the "Act to Register Mortgages," *Rev. Stat.* 658, which provides, that every mortgage shall be void against a subsequent judgment creditor or *bona fide* purchaser or mortgage for a valuable consideration not having notice thereof, unless such mortgage shall be acknowledged or proved according to law, and recorded or lodged for that purpose at or before the time of entering such judgment, or lodging for record the deed or mortgage to such subsequent purchaser or mortgagee.

If the notice contemplated by this Sec. must be prior to the entry of the judgment, and this, it appears to me must be the true construction of the act, 4 *Halsted's Reports*, 193, the complainant could not succeed, if all other difficulties were removed, unless he could show that Kingsland had notice of the alleged mistake in this mortgage prior to the entry of his judgment. A case of the character of the one now before the court was not, probably, in the contemplation of the Legislature. The leading object of the act, no doubt, was to provide that a judgment entered should be prior in lien to a mortgage before given, unless the mortgage was recorded prior to the entry of the judg-

ment, or unless the judgment creditor had notice of the mortgage.

In this case there was a mortgage recorded before the entry of the judgment. The question is not, whether the mortgage, as recorded, is good against the judgment; there is no doubt about that; but whether the judgment is not good against any subsequent incorporation into that mortgage of additional land, covered by the judgment, which, as between the parties to the mortgage, might be deemed to be bound by it on the ground that such additional land was intended by the parties to the mortgage to be included in it.

The question is: after a judgment entered, can a recorded mortgage be declared, as against the judgment creditor, to cover more land than the recorded mortgage covers, on the ground that as between mortgagor and mortgagee it was intended and supposed to cover more. It seems to me that to answer this question in the affirmative would be to allow too great indulgence to the negligence of parties. As to third persons acquiring subsequent liens on property, the record is their proper resort for information, and they must be permitted to rely on it with confidence. *Halst. Dig.* 637.

If a prior mortgage recorded does not, by mistake between the mortgagor and mortgagee, cover all the land it was intended to cover, it is the misfortune, to say the least, of the mortgagee; and, as between him and third persons acquiring liens, it must be considered his negligence. No good general purpose would be subserved, and much mischief would result, from undertaking to reform such prior mortgages as against subsequent liens. If it could be reformed as against a subsequent judgment creditor, it could be as against a subsequent mortgagee, for they both stand on the same ground. There is nothing in the proofs, at all events nothing upon which the court can satisfactorily ground a decree for the complainant in a case of this character, to show that Kingsland had any knowledge of any mistake in the mortgage at the time of the entry of his judgment. No such idea as a mistake in the mortgage had ever been suggested by any body at this time. We

may conjecture that Kingsland, from his relation to one or more of these associates, and from conversations he would be likely to hear, may have supposed that the mortgage covered more land, but the record spoke differently.

If, then, the notice contemplated by the Sec. we have referred to must be before the entry of the judgment, the complainant must fail on this ground alone. And I do not see how the express language of the statute can be overcome. Any subsequent notice to him would not answer, for if the judgment is good against all lands not covered by the recorded mortgage, on the ground that the judgment creditors had no notice before the entry of the judgment, a sale under the judgment would be good, though he had notice after the entry of the judgment.

If I could pass this point favorably to the complainant, there are other very serious difficulties in his way. The complainant's counsel seem to have considered that it would not be safe for them to rely on any proof they could offer of notice to Kingsland before the entry of his judgment; or on the ground that a judgment creditor was not entitled to notice; or on the ground that a judgment creditor, purchasing property under his own judgment without notice is not to be considered a *bona fide* purchaser without notice. He caused a notice to be served on Kingsland after the property had been struck off to him at the sheriff's sale under his judgment and that of Wm. Mix. A copy of the notice is in evidence. It was a notice that Margaret Rutgers held a mortgage given by Brown to Pomeroy, dated Sept. 7, 1836, for \$12,000, payable, &c., which was duly acknowledged and recorded, on which all the principal money was due, with interest from Jan'y 7, 1839, except \$150 of the interest paid since that date; and that the said mortgage embraces a part of the lands levied on under executions in favor of Wm. Mix and the said Jos. Kingsland; and that Margaret Rutgers claims to hold under the said mortgage, and to be entitled to a lien upon six acres or thereabouts of the lands so levied on, including the stone dwelling-house and its appurtenances thereon situated, that is to say upon all that piece or parcel of land, beginning, &c., and giving certain courses and distances, and extending the line, on the course S. 43 deg.

West, two chains and 72 links beyond the point where that line stops in the mortgage, (the distance given in the mortgage on that course being but five chains, an extension of this line two chains and 72 links would be necessary to obtain the object sought by the bill ;) and that the said Margaret is about to proceed in the Court of Chancery for the enforcing of such lien. This is simply a notice, that by a certain mortgage on record, Margaret Rutgers claimed these boundaries. The record showed that the boundaries given in the mortgage were different. Which was K. to consider right ; the boundaries claimed by the notice, or those given by the record ? And what was K. to understand by this notice ? Was it that the mortgage was not truly recorded ; that the boundaries given in the mortgage itself were the boundaries claimed ? There is nothing said in this notice of the ground on which she claimed a lien according to the boundaries given in the notice. It is not said that she claims those boundaries because it was intended that the mortgage should give them, and that a mistake in the boundaries was made in drawing the mortgage. The notice is simply that under the mortgage she claims a lien according to the boundaries given in the notice. And it would be quite as natural for K., or any one else, to suppose that the meaning of the notice was, that the mortgage, right in itself, was wrongly recorded, as that the mortgage was wrong and did not include all the land intended to be mortgaged. It was certainly not notice of a mistake in drawing the mortgage. And if any purchaser chose, after such notice, to examine the records, and found that the record of the mortgage was different from boundaries claimed by the notice, and to put himself on the ground that he would risk being bound further than the record went, though the mortgage itself might go further, his danger from what he supposed, and might under such a notice suppose to be the difficulty, that is to say, an incorrect record, differing from the mortgage, would be at an end when it appeared that the mortgage was the same as the record.

It appears to me that the notice, in a case like this, should have stated that the ground on which the boundaries set out in it were claimed was, that they were the boundaries in-

Rutgers v. Kingsland.

tended to have been inserted in the mortgage, and that by mistake, the courses and distances were so run as to exclude a part of the land intended to be mortgaged. There is nothing in the nature of the notice given which would authorize Kingsland to refuse to take the deed from the sheriff.

Again, these lands were sold on the judgment in favor of Wm. Mix, for \$2,800, as well as on the judgment of Jos. Kingsland; and no notice was served on Wm. Mix. If the sale, had it been made entirely under his judgment, would have been good against the alleged mistake in drawing the mortgage, it cannot be bad because it was sold at the same time under K.'s judgment also. If the sale would have been made on K.'s judgment alone, yet, K., by his purchase at a sheriff's sale on both these executions, acquired the rights of a purchaser under the judgment of Wm. Mix.

I am of opinion, that the complainant can sell, by virtue of her mortgage, only the lands included within the boundaries therein given.

Decree accordingly.

AFFIRM 3 *Hal. Ch.* 658. CITED IN *Gales Ex.'s v. Morris*, 2 *Stew.* 225.

JONATHAN LORE and others vs. JOHN GETSINGER and
JOSEPH GETSINGER and others.

The statute entitled "An act respecting the Court of Chancery," Rev. Stat. 921, providing that on the return "no goods" on an execution issued on a judgment at law, a bill may be filed for the discovery of any property, thing in action, &c. belonging to the debtor, or held in trust for him, made no change as to the rights of creditors against the fraudulent conveyance of property that may be reached by execution. This class of cases stand as they did before the statute.

Three creditors had obtained judgments in a Justice's Court, against the same defendant, the judgments, with the costs thereon, amounting, together, to \$103, and had issued executions thereon, which were all returned "no goods."

Held, that they might unite as complainants in a bill to set aside a fraudulent transfer of personal property that might be reached by execution.

The bill charged, also, that a certain conveyance made by the defendant of real estate was fraudulent; and prayed that that, also, might be set aside. After the bill was filed, one of the creditors obtained a judgment against the defendant in a higher court, which was a lien on lands, (the judgments in the Justices' Court being no liens on lands.) An amendment of the bill to introduce the subsequent judgment was not permitted.

Facts on which the transfer of personal estate was declared void as against creditors.

On the 6th February, 1846, John Getsinger and Joseph Getsinger, who were partners in the manufacture of glass, executed to George B. Cooper and Charles B. Townsend a bill of sale of all the personal property which the said Getsingers held in partnership; and of all the furniture in each of their houses; and all the hogs, cows, calves, hay, rye, corn and other grain belonging to them, respectively; and all the lumber, cut and in the log, on the landing or elsewhere, and all the glass manufactured or in progress of manufacture, and 701 boxes of glass then in the possession of Francis Lee and J. P. Bickley, and all and every article, of every kind, belonging to them jointly or individually, for the consideration in the said bill of sale expressed of \$1; the bill of sale containing a covenant that the said Getsingers were the lawful owners of the said goods. On the same day, the Getsingers, with their respective wives, executed to the said Cooper and Townsend a deed, in fee simple, for the consideration therein expressed of \$1,250, for thirty-six

tracts of land, describing them, including a tract of about ten acres on a part of which the glass factory buildings and the said houses of the Getsingers and other houses stood, and containing altogether about 3713 acres of land ; which deed contained a covenant of warranty on the part of the grantors against them and their respective wives and all persons claiming under them or any of them ; and was duly recorded.

On the same day, Cooper and Townsend, by deeds executed by them, conveyed to the children of John Getsinger, naming them, in fee, the house and lot where John Getsinger lived, and to the children of Joseph Getsinger, naming them, in fee, the house and lot where Joseph Getsinger lived. These two deeds were not recorded.

On the 19th February, 1846, Jonathan Lore recovered a judgment in a Justice's Court against the Getsingers, for \$11,09 of debt, and \$1,74 costs ; on which a *fi. fa.* was issued, and returned March 13, 1846, "no goods." Another execution from a Justice's Court, on a judgment entered Feb. 20, 1846, in favor of John Wallis, against the Getsingers, for \$42,38 debt and costs was also returned, March 13, 1846, "no goods." Another execution from a Justice's Court, in favor of James Smallwood against the Getsingers, on a judgment entered Feb. 21, 1846, for \$48,53 debt and costs, which judgment had been assigned to David Lore, was returned, March 13, 1846, "no goods."

On the 11th August, 1846, Lorenzo Ogden recovered a judgment in the Circuit Court of Cumberland, against the Getsingers, for \$1,203.13, on which execution was issued, and returned "no goods." On the same day, Jonas Hess recovered a judgment in the said Circuit Court against the Getsingers, for \$1429,19, on which an execution was issued and returned "no goods." And, on the 20th May, 1846, Jonathan Lore recovered a judgment, in the said Circuit Court, against the Getsingers, for \$665,93, on which execution was issued, and returned "no goods." On the 16th of April, 1846, Jonathan Lore, John Wallis and David Lore filed their bill, for themselves as judgment creditors of the Getsingers, and for all other judgment creditors of the Getsingers who should come in, &c., stating the foregoing facts ;

and stating, further, that at the time of the making of the said bill of sale, the said Getsingers were indebted to divers persons in large sums of money, and among others, to the said complainants; and that the said bill of sale was without any valuable consideration bona-fide paid; and that the Getsingers have been permitted to retain the possession of the said property ever since the making of the said bill of sale; and charging that the same is fraudulent and void as against the complainants; and stating, in reference to the deed for the lands, that there was a secret understanding that the grantees, C. and T., should re-convey to the children of the Getsingers, respectively, the houses in which the said John and Joseph Getsinger, respectively, lived, and should pay to John Getsinger \$300 a year, and to Joseph Getsinger \$200 a year, as long as the glass works should be carried on.

That C. and T., sent an express, the same night the deed to them was executed, to Bridgeton, a distance of 16 miles, and had the said deed deposited with the Clerk of the County, for record before daylight the next morning; that the said two deeds to the children have not, as the complainants are informed, yet been recorded; that, although the said deed to C. and T., purports to have been made for the consideration of \$1250 paid before the delivery thereof, yet the complainants are informed, believe and charge, that no money whatever, or if any, a mere nominal sum was paid. They charge that the said deed was made for the purpose and with the intent to delay, defeat, hinder and defraud the creditors of the Getsingers, and is therefore fraudulent and void as against the complainants and the creditors of the Getsingers, or either of them. That the said two deeds made by C. and T., to the children of the said Getsingers, respectively, were made without any valuable consideration therefor paid by the said children or either of them; and were made at the same time with the said deed and bill of sale to C. and T.; and were a part of the same transaction and a part of a plan devised by the said J. and J. Getsinger and C. and T., to put the property of the Getsingers, or a considerable portion thereof, beyond the reach of the creditors of the Getsingers, and to enable them to keep possession of the said houses and lots and of t' :

furniture and other articles in the said houses, and to use, occupy and enjoy the same as if no such deed or bill of sale had been made. They charge, that the said two deeds, made to the said children, respectively, were made with the intent and purpose to defraud, hinder and delay the creditors of the Getsingers, and are therefore fraudulent and void as against the complainant and all other creditors of the Getsingers.

The bill then states what the complainants charge to be the value of the real and personal property conveyed to C. and T., and the value of the two houses and lots conveyed to them by the children of the Getsingers; charging the real estate to be worth \$14,000, subject only to an encumbrance of \$11,745.23; and the personal estate to be worth \$5,000 or \$6,000; and the two houses conveyed by C. and T., to the children to be worth \$1,000 each. That, at the time of the said conveyances, the aggregate amount of the indebtedness of the Getsingers was not less than \$25,000; and that C. and T. knew, at the time, that the Getsingers were largely indebted, and more than they were able to pay.

That the Getsingers are Germans, and but little acquainted with the English language; very ignorant of our laws and of the proper mode of transacting legal business, and of the nature and effect of legal proceedings. And that the complainants are informed and believe that the said Getsingers were hurried and constrained, by various unfounded representations held out to them by Cooper and Townsend, or one of them, to execute the said conveyances, without giving them time to consult their friends whom they desired to consult, or take the opinion of counsel, or to fully understand the nature and effect of the conveyances they were required to sign. To show which, the complainants say that John Getsinger asked Townsend to give him from Friday, the day on which the deeds bear date, until the Monday following, to consult his friend John G. Rosenbaum before he executed the said deeds; but that Townsend insisted that the deeds must be executed on the said Friday, and told the said Getsinger that if it was not done that day the Sheriff would sell their property the next day, though the Sheriff had not advertised the property, and Townsend well knew the Sheriff

could not sell the next day. That the complainants are informed and believe that Townsend gave as another reason to the Getsingers why he could not delay the business until Monday, that he had four lawyers on expense, and could not wait; and that, notwithstanding the said John Getsinger was advised by his friend James Ward not to enter into any writings until he got legal advice as to the effect thereof, and that there was no necessity of hastening the sale, and notwithstanding the said Ward carried to the Getsingers a proposition from Joshua Brick and others that, if the Getsingers would make an assignment of their property for the benefit of all the creditors, the creditors would make to them a deed for the houses in which they lived, yet the Getsingers declined the proposition.

The bill then introduces statements that the complainants have reason to believe, and do believe, that the Getsingers have equitable interests, things in action, &c., of the value of \$100 and more, which they have been unable to discover and reach by executions on their judgments; and seeks a disclosure from the Getsingers.

The bill prays a receiver, and that the Getsingers may be enjoined from collecting, receiving, selling or transferring any of their debts, goods, account books, notes, &c. &c.; and from confessing any judgment for the purpose of giving any creditor a preference over the complainants; and that the said bill of sale and deed to Cooper and Townsend may be declared void; and also the two deeds from Cooper and T. to the children of the Getsingers, and that C. and T. may be enjoined from selling, taking away, or disposing of any of the personal property mentioned in the bill of sale.

It appears that, at the date of the said deeds and bill of sale, the real estate was subject to a mortgage, dated August 16, 1845, given to Joshua Brick, Thos. Lee, Frances Lee and T. B. Bickley, to secure \$11,755.23 in six and twelve months, with interest; and that, at the same time an execution existed, which had been levied in November before on the personal property of the Getsingers at the time of the levy, issued on a judgment for \$2,400, obtained by Lee and Bickley against the Getsingers, which, it was admitted in the argument, was for a part of the

money secured by the mortgage; and that there were, at the same time, several executions in the hands of constables, which had been levied on personal property of the Getsingers, amounting in all to about \$224.

The Getsingers and Cooper and Townsend put in their joint and several answer.

They admit the judgments, executions and returns thereon stated in the bill. They say that the bill of sale was made for a valuable consideration bona fide paid and agreed to be paid by C. and T. to the Getsingers; that the articles therein mentioned, except 701 boxes of glass in the possession of Lee and Bickley, were at the execution of the bill of sale, delivered to C. and T.; and that the same, except some articles of household furniture of the Getsingers, of but small value, have ever since remained in the possession of C. and T.; or have been consumed by them in the progress of their business; and they deny that the said bill of sale was made with any view to injure, delay or defraud creditors, or that the complainants have in any way been injured thereby; and they submit that the same was a valid, fair and *bona fide* transaction.

They admit the deed from the Getsingers to C. and T. They say that the bill of sale and deed were made at the same time, and were one and the same transaction, and were made by the Getsingers and their wives, to convey to C. and T. their interest in certain glass works and tracts of land appurtenant thereto, and certain personal property principally connected therewith, in pursuance of a contract made by the said parties, fairly and deliberately, for a fair and *bona fide* consideration equal to the full value thereof, as it was then situated; and in the fair and ordinary transaction of business; with no view to defeat, delay or injure the complainants or any other creditors of the Getsingers.

They say, that the true consideration paid and agreed to be paid for the said real and personal property was the following: the execution (before stated) in favor of Lee and Bickley, and which they paid on the 12th of February, 1846, amounting to \$2,512.18; that they also agreed to pay, for and on behalf of

the Getsingers, at their request, \$500 *bona fide* due from them to one Joseph Schmouse, \$250 *bona fide* due from them to Lorenzo Ogden, \$150 *bona fide* due from them to Richard Mitchell, and \$100 *bona fide* due from them to Charles Bank, and several sums upon executions in the hands of constables, previously levied on the said personal property, supposed to amount to \$250, and which afterwards proved to be \$224; all which sums the said C. and T. have fully paid and satisfied: that the real estate was subject to a mortgage (being the mortgage before mentioned) for \$11,755.23, which money, or such part thereof as was justly due, the said C. and T. agreed and expected to pay. That the wives of the Getsingers had not signed the said mortgage, and were entitled to a prospective right of dower, and were unwilling to join in executing the said deed without some reasonable equivalent; and it was therefore agreed that, in consideration of their joining in the said conveyance, and as some compensation to them for their right of dower, the two houses mentioned in the bill should be conveyed to such persons as the wives should designate and request; and at their request the same were accordingly conveyed to the children of each.

They deny that the said houses were worth anything like \$1200 each; but believe that \$1200 would be a good price for the two. They say that the said houses were no more than a reasonable consideration to the wives for joining in the conveyance; that the other property conveyed by them to C. and T., sold by deed conveying all the right of the wives, would bring considerably more, either at public or private sale, and was actually worth more than the whole property, including the said houses, would be worth or bring if conveyed by the husbands alone. And the defendants C. and T. state, that they would not have given for the whole property, including the two houses, what they have given and agreed to give, if the wives had refused to join in the conveyance. They say that the said deeds were not, nor was either of them, made for the purpose and with the intent to delay, hinder or defraud the creditors of the Getsingers, or either of them; but that they were made in pursuance of a fair and *bona fide* contract, and for a good and adequate consideration; and they in-

sist that the same are valid ; and they deny that there was any intention or desire to put the property of the Getsingers, or any part thereof, beyond the reach of their creditors, or that there was any plan or intention so to do.

The defendants C. and T. for themselves say, is it true they sent up the deed to be recorded in the night, exercising in so doing, as they believe, only a reasonable precaution against any attempt they had reason to believe might be made by designing persons to injure and defraud them ; and, as they submit, thereby doing nothing illegal, improper or suspicious ; and they also caused the said bill of sale to be put on record, being willing that all their acts in the matter should be public.

The defendants deny that the real estate was worth \$14000, and deny that the personal property included in the bill of sale was worth \$5,000 ; nor do they believe that it was worth more than was given for it by C. and T. They say that the personal property was valued, previous to the sale, by persons appointed by the Sheriff, one of whom was a creditor of the Getsingers, at about \$1500, including what is contained in the bill of sale, except some articles amounting in value to about \$150, and except the 701 boxes of glass in the possession of Lee and Bickl y, which are claimed by them, or by them and Joshua Brick and Thomas Lee, and have not come to the possession of C. and T., or to any-one for their use, being of the value of about \$1028.

That at the time of the said sale it was, and is still the belief of the defendants, that the real estate would not bring, at a public sale, more than the incumbrances on it ; and had the works gone out of blast, there is every reason to believe that the said real estate would not pay the incumbrances. That property of that description is very precarious and uncertain in its value, and would be greatly depreciated by ceasing to be worked for any considerable time ; and, as these defendants then believed and still believe, would be greatly lessened in value by any material reduction of the rates of duties levied by the U. S. on glass ; the great probability of which reduction the defendants were well aware of when the said sale was made. They deny that there was any understanding at the time of or previous to said conveyances and bill of sale, and as any part of

the consideration for making the same, that C. and T. should pay John Getsinger \$300 a year, and Joseph Getsinger \$200 a year as long as the glass works should be carried on.

These defendants C. and T. purchased the said property with the bona fide view of carrying on the said glass works for their own advantage and profit ; and since said purchase have so carried them on, and expect to do so. There is not now, nor has there ever been, since the making of the said conveyance, any agreement or understanding, express or implied, that the Getsingers, or either of them, or any other person for their use and benefit, shall have any share of the profits, or any interest in the said property, or any right to the same in any contingency, except their right under the lease hereafter mentioned.

C. and T., who are not practical glass blowers, needing the services of the Getsingers, did agree with John Getsinger to pay him \$300 a year, in quarterly payments, for his services as superintendent of the glass factory, at which rate they have paid him since their said purchase ; and to pay Jos. Getsinger \$200 a year, quarterly, for his services as master blower and pot maker, at which rate they have paid him since their said purchase ; and they also made a lease to the sons of John and Jos. G. for two lots of meadow, at the annual value of not exceeding \$50, for the use of the said John and Joseph, the proceeds of which they receive, in addition to the sum aforesaid ; and which said sums and the proceeds of said meadow are no more than a reasonable consideration for the services actually rendered by the Getsingers to C. and T., and no more than are usually paid for similar services.

The defendants admit that, at the time of making said bill of sale and conveyance the Getsingers were largely indebted ; and, although C. and T. had no particular knowledge of the said debts, they were informed that such was the case ; and the fact also, was, as the defendants all believe, that the affairs of the Getsingers were so situated that there was no reasonable prospect of their being able to pay anything more than the incumbrances then on the property, had they not succeeded in effecting a sale to persons able and willing to carry them on. Had the whole personal property levied on been sold under the execu-

tions and dispersed, or had the Getsingers made an assignment, the works must have stopped ; and in either case the property must have greatly depreciated, to the injury of the creditors. These defendants believed at the time the sale was made, and still believe, that the sale, for the price obtained and actually paid to the creditors of the Getsingers, was the best arrangement that could be made for the benefit of all concerned.

The defendants say it is true that the Getsingers are Germans and but little acquainted with the English language, and are not well acquainted with the laws of the country ; but the defendants the Getsingers declare that, before executing the conveyance and bill of sale, they made themselves fully acquainted with the nature and effect thereof, and were at the time, and still are, entirely satisfied that they did what was best for themselves and best for their creditors.

The defendants say that the proposition to purchase the said works was first made by the Getsingers to C. and T., and that negotiation respecting the purchase was in progress a full week ; and the Getsingers deliberated on the subject and consulted with their friends during that period until fully satisfied. The defendants deny that unfounded representations were made by C. and T., or either of them, to the Getsingers, or either of them, to induce them to execute the said conveyances. They say that the terms of the contract had been agreed upon on Friday, and C. and T. were desirous and urged that the business should be completed that day, if at all ; and C. and T. say they were induced so to do because ample time had been spent in arranging the business, and further delay would occasion them additional expense and inconvenience, and because they were informed and believed and still believe that J. Brick, Thos. and F. Lee and Bickley were using all the means in their power to embarrass them and to break up the business of the glass works, and bring the Getsingers wholly under their power and control. The defendants say they believe, and therefore state that the complainants' bill was filed at the instigation of and in concert with said Brick, Lees and Bickley, who contribute, as the defendants are informed and believe, to the expenses of this suit, and are really parties thereto ; and they believe, and therefore

state, that the whole difficulty has been produced by their interference and to serve their private purposes. The Getsingers depended much on them, for many years, for advice and aid ; but it having come to the knowledge of the said Brick, Lees and Bickley that their business had not prospered, and that the Getsingers had met with very heavy losses, by fire and otherwise, Brick, and Bickley his son-in-law, and the said Thos. Lee, and Francis Lee his son, who had previously been much at variance and for a long time not in the habit of transacting business together, reconciled their difficulties, and, as the defendants believe and state, concocted together and unjustly and unlawfully combined to get the said glass works into their own hands, or to get the management of the business ; and joined together, in pursuance of said design, to obtain from the Getsingers the said mortgage and judgment, and then suddenly refused to give them any further credit, or afford them any aid ; but caused their executions to be levied, and were proceeding to enforce a sale ; and when they found that their said design was likely to be defeated, and that the Getsingers were in a fast way to sell the works to C. and T., they combined with the complainants to embarrass and throw all the difficulties in the way of the defendants in their power.

The Getsingers say, that John Getsinger owns some land in Atlantic county, which is mortgaged to a creditor of the said Getsingers for its full value ; and they say they have annexed to the answer a list of all their property, and debts due them which have been contracted within any reasonable time, and which are of any value, setting forth what they consider may perhaps be collected, and which they suppose are doubtful or desperate ; and they say that, except what is contained in the said list, and except their earnings since the making of said conveyances, which they have from time to time expended in the support of themselves and their families, and except the lease before mentioned, they, or either of them, had not, at the time of the rendition of the judgment in the bill mentioned, possessed, owned or had, and do not now possess, own or have any property of any kind. •

The Getsingers say they have always been and still are at

sirous of paying all their debts, and have made every possible effort to do so, and have always intended to appropriate every cent they could collect of the debts due them, and all their property to the payment of their debts; and that they have never concealed the same; but are desirous now to collect what is due them, and pay the same to their creditors, and submit that they ought to be allowed to do so without further restraint or hindrance.

The answer submits, that the complainants have not brought themselves, by the facts stated in their bill, within the provisions of the act entitled "An act respecting the Court of Chancery," and are not entitled to the benefit thereof; and they hope they shall have the same benefit of this defense as if they had demurred.

The case was heard on the pleadings and evidence.

W. Halsted for the complainants. He cited *Long on Sales*, 69, 70, 72, 282, 3; 1 *Halst. Rep.* 155; 1 *Cranch*, 309; 3 *Gilman's Rep.* 455, 463; *Story on Sales*, 437; 2 *Kent's Com.* 531, 2; 9 *John. Rep.* 337; 2 *Burr's Rep.* 328; 2 *Wharton*, 302; 6 *Ib.* 53; 3 *Coke's Rep.* 80; 2 *Scho. & Lef.* 492, 501; 2 *Paige*, 333; 3 *Gilman*, 523; 9 *Paige*, 595, 605; 5 *Ib.* 505; 1 *Edw.* 271, 451; *Mitf. on Pl.* 262; 12 *Ves.* 48; 8 *Wend.* 339; 4 *John. Ch.* 183; 5 *Ib.* 276; 1 *Hopk.* 112; 7 *Day*, 205, 496.

L. Q. C. Elmer and *P. D. Vroom* for the defendants. They cited 2 *Rev. Stat. of N. Y.*, 173, sec. 37; *Rev. Stat. of N. J.*, 921, 2; *Story's Eq. Pl.*, sec. 332, 3, 885, 6, 7, 8; 1 *Paige*, 200; 1 *Green's Ch.* 258; 4 *John. Ch.* 671; *Clark's Ch. Rep.* 299; 7 *Paige*, 583, 350, 637; 2 *Ib.* 637; *Story on Sales*, 447 to 457; 7 *Halst. Rep.* 285; 2 *South. Rep.* 738; 4 *Harr. Rep.* 166; 4 *Halst. Rep.* 135; 5 *Term. Rep.* 235; 1 *Saxt. Ch.* 341; 9 *Ves.* 246; 1 *Bro. Ch.* 175.

THE CHANCELLOR. It is objected in the answer, and the objection has been urged in argument, that this is a creditor's bill under our act entitled "An act respecting the Court of Chancery," *Rev. Stat.* 921; and that no execution of either of the complainants, nor all the executions of the several complainants together amount to \$100, exclusive of costs; and that therefore the bill cannot be sustained.

This act provides that whenever an execution issued on a judgment at law against the property of a defendant shall have been returned unsatisfied in whole or in part, leaving an amount or balance due exceeding \$100 exclusive of costs, the party suing out such execution may file a bill in Chancery to compel the discovery of any property or thing in action belonging to the defendant in the judgment, and of any property, money, or thing in action, due to him or held in trust for him, except such property as is now reserved by law; and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself; and that the court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any personal property, money, or things in action belonging to the defendant, or held in trust for him, (with the exception above stated,) which shall be discovered by the proceedings in Chancery; but if the personal property, money or thing in action which shall be discovered as aforesaid shall not amount to \$100, no costs shall be recovered against the defendant.

The English Courts, after much discussion, established the doctrine that, to make a conveyance void as against creditors, it must be a conveyance of property which the creditor could take in execution; for that a conveyance of property not subject to execution cannot be injurious to creditors, because it would not withdraw any fund from their power which the law had not already withdrawn from it, and a conveyance which in no respect varied the rights of creditors could not be a fraud upon creditors. Under this doctrine, a debtor might hold, or transfer to another for his use, any amount of stock, choses in action, or other property not subject to execution, in defiance of his creditors. 1 *Story's Eq.*, sec. 367.

Chancellor Kent has very strongly and ably combatted this doctrine. *Ib.*, sec. 368, and note and authorities there cited.

The existence of such a doctrine in England, whether well founded or not, and the least apprehension that such a doctrine was maintainable here, certainly furnished sufficient

ground for the adoption of our statute. And it is plain from its language, that it was intended to displace, in this State, the English doctrine above mentioned, and to put creditors on the ground on which Chancellor Kent contended they ought to stand without the aid of any statutory provision. It has made no change in the law as to the rights of creditors against fraudulent conveyances of property that may be reached by execution. This class of cases stand as they did before the statute. This objection, therefore, cannot prevail,

This bill is filed by three creditors who have obtained judgments in a Justice's Court, on which executions have been issued, and returned "no goods," amounting, with the costs, to \$103.74, for themselves and all other judgment creditors of the Getsingers who shall come in, &c., seeking to set aside a bill of sale transferring to Cooper and Townsend personal property of a tangible kind, on which an execution at law might be levied, and also to set aside a deed to C. and T. of real estate, on the ground alleged, that the said bill of sale and deed are fraudulent and void as against creditors. Protection of the right of creditors to payment out of the property of their debtors, against the disposition of their property with a view to defeat that right, by declaring such disposition void as against the creditors, is too obvious a policy and duty not to have been recognized from the earliest periods. And so careful are the courts of the rights of creditors, that the debtor cannot by transfer or conveyance put his property beyond their reach, unless such transfer or conveyance is made both upon good consideration and *bona fide*; and even if the transfer or conveyance be made for a valuable and adequate consideration, yet, if it be made with intent to defraud creditors, it is void as against them. The indicia of fraud, the circumstances from which the presumption of an intention to defeat creditors will arise, must of course be clear and strong where a valuable and adequate consideration is paid. Courts of equity afford their aid in relieving the creditor from frauds of this kind; and transactions the fraudulent character of which might not be reached or declared by courts of law are often exposed by the nature of the proceedings in courts of equity.

Of this jurisdiction of courts of equity there can, at this day, be no doubt. The duty of the courts of New Jersey of exercising to the fullest extent, and with a scrupulous regard for the rights of creditors, their jurisdiction over this subject, is rendered more imperative by the recent legislation in this State exempting the person of the debtor from imprisonment for debt.

The complainants who filed this bill were creditors on judgments obtained before a Justice of the Peace. Their judgments are no liens on real estate. They issued executions against the personal estate of the defendants the Getsingers, which were returned "no goods." They are in position, then, to ask the aid of this court against a transfer of personal property of the Getsingers of a nature to be subject to execution, if such transfer is fraudulent and void as against them, unless the fact of their judgments being less than \$100 each, or the fact that their three judgments together amount only to \$103, including costs, prevents; or unless such judgment creditors cannot unite in filing a bill and the amount of either of the judgments is insufficient to justify the interposition of this court.

Without saying what amount of judgment and execution before a magistrate should be sufficient to invoke the aid of this court, I am of opinion that such creditors may unite, and that the amount of these three judgments together is sufficient to call for the exercise of the jurisdiction of this court, in reference to personal property of a nature to be subject to levy on execution, in the protection of their rights against a fraudulent transfer thereof. 8 *Wend.* 339.

The answer in this cause was filed Sept. 14, 1846. The replication was filed Nov. 3, 1846. On the 12th of May, 1846, Jonathan Lore, one of the complainants, recovered another judgment against the Getsingers, in the Circuit Court of Cumberland county, for \$665 93, on which a *fi. fa.* was issued; and the *fi. fa.* was returned "no goods," on the second Tuesday of August, 1846. An *alias fi. fa.* was subsequently issued on this judgment, tested the second Tuesday of August, 1846, returnable the second Tuesday of Nov., 1846, by virtue of which a levy was made on the 9th of October, 1846, on personal property of the Getsingers, consisting of household furniture, (mentioning the

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articles,) and hay and grain, "together with all the moveable property in the possession of John Getsinger and Joseph Getsinger. The property levied upon under this *alias fi. fa.* was claimed by Cooper and Townsend, by notice in writing delivered to the Sheriff; and a jury was summoned, according to the provisions of the statute in that respect, to try the right of the claimants to the said property. The complainant in the said judgment did not indemnify the Sheriff against the demand of the claimants; and the right of said claimants was tried by a jury, and the property levied upon was found by the jury to be in the claimants.

On the 11th of August, 1846, Jonas Hess recovered a judgment in the Circuit Court of Cumberland, against the Getsingers, for \$1,429 19, on which an execution was issued, tested the second Tuesday of August, 1846, returnable the second Tuesday of November, 1846, by virtue of which the Sheriff levied on the same property levied on by virtue of the *alias fi. fa.* issued on the said judgment of Jonathan Lore, with the same general clause added; and Cooper and Townsend having put in a claim to the property, the claim was tried before a jury, and the property levied on was found to be in the claimants. The claim was tried on the 31st of October, 1846; Hess omitting to indemnify the Sheriff.

On the 11th of August, 1847, Lorenzo Ogden recovered a judgment in the Circuit Court of Cumberland, against the Getsingers, for \$1,203 13, on which a *fi. fa.* recorded October 29, 1846, was issued, returnable the second Tuesday of November, 1846, which was returned "no goods nor lands."

On the 23d of June, 1846, an order was taken on the part of the complainants, that the complainants be at liberty to amend their bill, by making Lorenzo Ogden and Jonathan Hess parties complainants, and by setting forth their respective judgments, executions and returns; and further to amend the bill by setting out the judgment recovered by the complainant Jonathan Lore since the filing of the bill, and the execution issued thereon, returnable to the August term, 1846, and the return thereof "no goods." It was agreed on the argument of the cause, that this

order should be considered as having been subject to the decision of the court as to the propriety thereof.

When the bill was filed, no one of the complainants had any lien on the real estate, their judgments being obtained before Justices of the Peace. When the bill was filed, therefore, the case made by it was not such as to give the court any ground on which to entertain the cause so far as it sought to affect real estate. The bill could not properly pray any action of the court in reference to the real estate, or any relief in respect thereof. Such a bill cannot become the basis of a proceeding in reference to real estate on the ground that judgments were subsequently recovered which were liens on the real estate, and by permitting an amendment of the bill introducing the subsequent judgments affecting real estate

It will not be necessary, therefore, and not proper, perhaps, to say anything as to the deed for the real estate from the Getsingers to C. and T., or the character of it as fraudulent or otherwise.

As to the bill of sale of the personal estate, I am of opinion that it cannot be sustained as against creditors.

From the evidence as to the value of the real property, and the fact that it was mortgaged, the wives not joining in the mortgages, for within \$1250 of the consideration named in the deed, and within \$1000 of what one of the papers says was to be actually paid, it appears to me that the real estate, if, in view of other circumstances which I will not now mention, the deed therefor can be sustained, was very amply worth all the defendants have agreed to pay to or for the Getsingers.

The consideration for the whole personal property nominal in the bill of sale, was, I think, nominal in fact. The considerations, growing out of the testimony, leading to the conclusion that this bill of sale ought not to be supported as against creditors are too numerous to be stated at length. The court, in my judgment, cannot sustain such a transaction without an utter disregard of the right of creditors. The consideration for the deed for the real estate expressed in the deed is \$1250. This is to be considered as the consideration subject to the mortgage. By a writing under the hands and

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seals of C. and T., bearing even date with the deed, thus, “for and in consideration of certain <i>real estate</i> this day conveyed to us” (them) by the Getsingers and their wives, “do hereby promise, covenant and agree” to and with the Getsingers, “to pay Joseph Schmouse - - - \$500	
Three notes in the Cumberland Bank, one in favor of Lorenzo Ogden, to fall due March 1, 1846, for	250
One in favor of Richard Mitchell, to fall due April 3, 1846, for - - - - -	150
And one in favor of Jonas Hess, to fall due April 10, 1846, for - - - - -	100
	<hr/> \$1,000

On the same day the Getsingers give a receipt to C. and T., by which they say they have received of them \$1,000, viz : (their assumptions to pay the above mentioned claims, setting them out,) in full consideration of the deed of same date made by them to C. and T. of certain real estate. This paper then states that they have received the further sum of \$1, in full for the consideration of certain personal property specified in a bill of sale of that date made by said Getsingers to C. and T.

Then another writing under the hands and seals of C. and T. appears, purporting to be signed the same day, as follows :

“LIABILITIES OF THE MESSRS. GETSINGER.

The bond and mortgage to Brick, the Lees and Bickley, - - - - -	\$11,755.23
Interest thereon, - - - - -	420.00
Lee and Bickley’s judgment and execution,	2,433.43
Interest and Sheriff’s costs,	
Constable’s executions, about, - - - - -	\$250
Schmouse’s claim, - - - - -	500
Three notes in Bank, (being the notes specified in the two preceding writings,) 500	
	<hr/> 1,250.00

(These three last items amounting to \$1250,
the consideration expressed in the deed
for the real estate.)

Footed -

\$15,858.66

Then follows: "In consideration of certain real estate conveyed to us (by the Getsingers and wives) by deed bearing even date herewith, and in consideration of a bill of sale of certain personal property of like date, we promise and agree to pay off the above claims, or so much thereof as shall be honestly due and owing thereon; we believe said judgment and execution to be covered by the mortgage; and to indemnify and protect the said Getsingers and their property from any and every suit, claim and demand whatsoever founded on any of the claims above set forth."

It proves that the belief of C. and T. that the said judgment was for a part of the debt secured by the mortgage was correct.

When the judgment was paid, therefor, it paid so much of the debt secured by the mortgage on the real estate which they bought subject to the mortgage. It can form, then, no part of the consideration for the personal property.

Schmouse's claim and the three notes in Bank are expressly stated in the assumption of C. and T., and in the receipt of the Getsingers, to be in consideration of the real estate; and therefore can be no consideration for the personal estate.

There is nothing left, then, for a consideration for the bill of sale but the constable's executions, supposed to be \$250; they proved to be \$224; and the consideration called for in the deed of the real estate is large enough to pay these in addition to Schmouse's claim and the three notes, it being \$1250; and the bill of sale is actually made for the consideration expressed of one dollar.

The transfer of the personal estate cannot be permitted to stand on the idea of its being a consideration for which C. and T. conveyed a part of the real estate to the children of the Getsingers to induce the wives of the Getsingers to sign the deed for the real estate. Perhaps it might be permitted to C. and T. to make a reasonable compensation to the wives to induce them to sign the deed; but certainly the husbands could not be permitted to give C. and T. all their personal estate as a consideration for C. and T.'s conveying to the children a part of the real estate to induce the wives to sign the deed for the real estate.

In reference to the personal estate, the most they can in

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any shape be considered as having given for it is \$224. I am unwilling to give the sanction of this court to a transaction so novel and extraordinary, so suspicious in its character, and of such dangerous tendency as a precedent, as the transaction in reference to the personal property in this case.

It is unnecessary to inquire as to the effect of the verdicts of the juries before stated, inasmuch as there is sufficient of other personal property to satisfy the judgments existing at the time of filing the bill and the executions thereon issued and levied.

The bill of sale of the personal property will be declared void as against the complainants.

Decree accordingly.

REVERSED 3. Hal. Ch. 639.

ISAAC VAN WAGENEN, Executor of JAMES BALDWIN, deceased, *vs.* ISAAC BALDWIN and Wife, THOMAS ROWLAND, and others.

Testator directed the executor of his will to pay the interest of a bond and mortgage he held against P. A. to his wife, for her life, and then to J., his son, for his life, and then to pay the principal to J.'s children. It was held to be a specific legacy.

The will gave to T. R. what might be realized and received on a certain bond and mortgage, describing it, which the testator, at the time of making the will, held against H. B. After the making of the will, the testator, in his lifetime, received a deed for the mortgaged premises in full satisfaction of the bond and mortgage. Held, that the will operated as a devise in fee of the mortgaged premises.

A bequest to the trustees of the Bethel Church in Newark is a good bequest to a church the corporate name of which is "The Bethel Church in Newark."

A devise of a lot of land to A., in trust, as the site for a building for a free school for the benefit of all poor children within a certain district in a city, and a lecture-room for religious worship, and of another lot of land as a site for a dwelling-house, to be occupied by the minister that may from time to time officiate in the said room, the said lecture-room to be for the use of the denomination of Christians called Methodist Episcopal, and a bequest of \$1,200 toward the said building, are good.

James Baldwin died in the summer of 1841, leaving a will dated February 10, 1840. The will is as follows:—First, he directed his debts to be paid; Second, gave his wife such furniture and cow as she should choose, and John Trumpore's bond and mortgage for \$1,000; Third, gave his dwelling-house and three-acre lot where it stands to his executor, in trust for his wife for her life, then for his son Isaac for life, and then to go to Isaac's children; Fourth, directed the executor to pay the interest of a bond and mortgage he held against Pruden Alling, for \$6,000, to his wife for her life, and then to Isaac for his life, and then to pay the principal to Isaac's children; Fifth, gave to the executor an eleven-acre lot and house, and a six-acre lot, in trust for Isaac for life, and then to go in fee to his children; Sixth, gave to Julia A. B. Rowland \$1,500, to be paid in fifteen years—in the meantime the interest to be applied to her maintenance and education, the executor to invest it; Seventh, gave his farm at Middleville, of fifteen acres, to his mother, for her life, and after her death to Thomas Rowland;

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and also, gave to Thomas Rowland what might be realized and received on a bond and mortgage for \$900, dated October 19, 1835, given by Harris M. Baldwin to Daniel Pier-son, and assigned to and then held by him; Eighth, gave to his executor lots Nos. 74, 75, 76 and 26, designated on a certain map, in trust—the first three as the site of a building for a free school for the benefit of all poor children living between Ferry street and the river, and a lecture-room for religious worship; and lot No. 26 as the site for a dwelling-house to be occupied by the minister that may from time to time officiate in the said room, the said lecture-room to be for the use of the denomination of Christians called the Methodist Episcopal, the executor to lease the said lots until the said building is erected, and appropriate the income towards the said building; and also gave the bond and mortgage he held against David Smith, for \$1,200, towards the said building; Ninth, gave to Isaac lots Nos. 65, 66 and 67, designated on the said map; Tenth, gave to the executor \$4,000, in trust for Isaac for life, and then to his children; Eleventh, gave to the trustees of the Bethel Church in Newark \$100 a year, to be appropriated by his executor for the use of the minister who may from time to time officiate in the said church and have charge of the same as pastor; Twelfth, in case Isaac should die without issue, he gave \$2,000 of the money directed to be paid to Isaac to Sarah B. Sims; Thirteenth, if Isaac die without issue and leaving a widow, the widow to have certain personal estate for life, and on her death the same to go to the children of Peter Van Wagenen, &c.; Fourteenth, if Julia A. B. Rowland should die before receiving the \$1,500, and without issue, the bequest to her to go to her parents; Fifteenth, the provision for his wife to be in lieu of dower.

After the will was made, and before the death of the testator, Harris M. Baldwin became embarrassed in his circumstances, and conveyed the property covered by the said mortgage, for \$900, given by him and held by the testator in his lifetime, to Samuel Baldwin, the father of the said Harris M. Baldwin, and the said Samuel Baldwin conveyed the said mortgaged premises to the testator in his lifetime, in full discharge of the said bond

to secure which the mortgage was given; and the testator accepted the said conveyance in full discharge of the said bond.

Isaac Baldwin was the only child of the testator, and the testator had adopted Julia A. B. Rowland as his daughter.

The estate was insufficient to pay all the legacies.

The corporate name of the church mentioned in the eleventh item of the will is "The Bethel Church in Newark."

The executor filed a bill to obtain a construction of the will.

Answers were put in, and the case was heard on the bill and answers.

F. T. Frelinghuysen for the Executor.

B. Williamson for the defendant Isaac Baldwin.

W. Pennington for the defendant Thomas Rowland. He cited *Roper on Leg.* 33 to 41; 1 *P. Wms.* 779; 2 *Vesey, Jun.* 640; 4 *Ib.* 150.

THE CHANCELLOR HELD. That the bequest in the fourth item of the will, of the Alling bond and mortgage for \$6,000, was a specific legacy.

That the bequest, in the seventh item of the will, to Thomas Rowland, of what might be realized and received on the bond and mortgage given by Harris M. Baldwin for \$900, held by the testator when the will was made, and in payment and satisfaction of which the testator afterwards received a deed for the lands covered by the said mortgage, was an effectual devise to the said Thomas Rowland, in fee, of the said mortgaged premises; and that Rowland was entitled to receive from the executor the rents and profits which the executor had received from the said premises since the death of the testator.

That the devise in the eighth item of the will, of the lots therein mentioned, is a good devise to the executor, in trust for the purposes therein mentioned. And that the bequest, in this section, of the bond and mortgage given by David Smith for \$1,200, is a good bequest to the executor for the pur-

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poses therein mentioned, and is to be received by the executor as a specific legacy.

And that the bequest of \$1,500 by the sixth item of the will, and of \$4,000 by the tenth item of the will, and to the trustees of the Bethel Church by the eleventh item of the will, are generally pecuniary legacies, which must abate proportionably if the estate shall not be sufficient, after paying the debts and specific devises and legacies, to pay them in full.

PREROGATIVE COURT.

JUNE TERM, 1848.

IN the matter of the will of ISAAC LAWRENCE.

J. L., a resident in New York, died there insolvent in July, 1841, leaving a writing purporting to be a will, but which was refused probate as such (under a statute of New York, which provides that the cancelling of a subsequent will shall not revive a prior one which had been retained uncanceled) on the ground that the said writing had been revoked by a subsequent will; which subsequent will had been cancelled. Administration of the estate of J. L. was granted in New York to J. L. L., who was named in the said writing as one of the executors thereof. There being lands in New Jersey which the decedent in his lifetime owned, a creditor of the decedent, residing in New Jersey, obtained letters of administration in this State, and obtained an order for the sale of the said lands. W. B. L., with the approbation of J. L. L., obtained an act of the Legislature of New York, authorizing the Surrogate of the City of New York to deliver the said writing to him. W. B. L. obtained the said writing from the Surrogate of New York, and it was admitted to probate in New Jersey, by the Ordinary, on the 7th of April, 1848. On the petition of J. A. P., a person interested in the estate, presented to the Ordinary April 18, 1848, the probate was vacated on the ground that the notice of application for probate, required by statute, had not been given. The question of the validity of the writing as a will, in New Jersey, was not decided.

On the 7th of April, 1848, probate of the will of Isaac Lawrence was granted by the Ordinary.

On the 18th April, 1848, the petition of John A. Pool was presented to the Ordinary, stating that Isaac Lawrence died in July, 1841, leaving a widow and several children, his heirs at law, him surviving. That the time of his death, and for many years previous thereto, he was a resident of the State of

Will of Isaac Lawrence.

New York. That on his death an application was made to the Surrogate of the City of New York to obtain probate of a certain alleged will of the said Isaac Lawrence, and that probate thereof was refused on the ground that the said will had been revoked by a subsequent will; which subsequent will had also been revoked by cancellation or otherwise, as the petitioner has been informed and therefore admits. That letters of administration were thereupon issued by the said Surrogate of the City of New York to John L. Lawrence, then and still of that city, who is named as one of the executors in the said alleged will, and who proceeded to settle the said estate by due course of administration; and that such estate proved largely insolvent.

That the petitioner presented, for allowance and settlement, claims against the estate to the amount of \$14,000 or thereabouts; that the said amount was, upon due investigation, allowed him; and he has received about \$4,000 thereof, leaving due to him \$10,000, with interest.

That Isaac Lawrence died seized of real estate in the county of Somerset, in this State; and the said John L. Lawrence having neglected for several years to apply such real estate in this State to the purposes of such administration, an application was made by P. Z. Elmendorf, a creditor of the said estate to the amount of \$1,500, for letters of administration in this State; and that such letters were granted by the Surrogate of Somerset County in this State to Fred. Frelinghuysen, who proceeded to apply such real estate to the purposes of said administration, and received and audited such claims as were presented; and among others, this petitioner made a claim for this said unpaid balance, which was allowed.

That by a decree of the Orphans' Court of Somerset County the said lands were sold by the said administrator, F. F., for the payment of such debts as were audited as aforesaid, to Peter Conover, at public sale, which sale was confirmed by the said court, and a conveyance of the said land to the said purchaser was ordered by said Orphans' Court. That the petitioner, being informed that it was designed to present, in this State, such rejected will for probate, gave notice of his interest in the said estate to the Surrogates of Somerset

Will of Isaac Lawrence.

and Middlesex, and of his intention to contest the probate of the said will, if the same should be presented for probate.

That, within a few days last past, the petitioner has learned that the said alleged will has been presented to the Ordinary and Surrogate General of this State for probate and proved, as the petitioner avers, with a knowledge on the part of the applicant for such probate that such administration had been granted in this State, and such sale decreed and made.

That the petitioner intermarried, in the lifetime of said Isaac Lawrence, with Harriet, one of his daughters and heirs at law; and that application for such probate was made without any previous notice to him or his said wife.

The petition prays that the probate granted by the Ordinary may be vacated and annulled; and that, in the meantime, all proceedings under such probate be suspended until the further order of the Ordinary in the premises.

On this petition an order was made by the Ordinary, on motion of Wm. H. Leupp, of counsel for the petitioner, that Wm. B. Lawrence, to whom letters testamentary were granted by the Ordinary, show cause, on the 8th of May, 1848, at the Chambers of the Ordinary, in Newark, why the order admitting the said alleged will to probate should not be vacated; and that all further proceedings on such probate be stayed until the further order of the Ordinary; and that a copy of the said petition, and of the said order, be served within ten days on the said William B. Lawrence.

On the hearing, the affidavit of Wm. B. Lawrence, Jun., was read in opposition to the motion, stating that the estate of the deceased is indebted to him in \$250,000 for the balance due him on a decree obtained in his favor against the said estate in the Surrogate's Court of the County of New York for \$403,759.76, and that he is also attorney for Prime, Ward & King, whose claim was adjudged at \$29,138.87.

That he has good reason to believe, and does believe, that at the death of the said I. Lawrence, July 12, 1841, John A. Pool was indebted to him, and is now indebted to his estate, in \$30,000, or thereabouts, in addition to the sums of money actually paid by the said decedent for the support of the said Pool and

his family for several years previous to the death of the said Lawrence.

That having learned that Pool denied his indebtedness to the said estate, and claimed to be a creditor, and that he had, in the absence of any opposing interest, established a claim against the said estate, before the Surrogate of the City of New York, for \$14, 275.61, this deponent, on the 11th December, 1847, filed his bill as a creditor of the said estate against the said Pool, in the Supreme Court of New York, in Equity, praying, among other things, for an injunction restraining Pool from collecting such alleged debt, or any part of it, which injunction was granted and is still in full force; and that no attempt has been made to dissolve the same.

That about the time of filing his said bill, he accidentally discovered that the said Pool, and one P. Z. Elmendorf, had procured one F. Frelinghuysen, of Somerset, New Jersey, to take out letters of administration upon the estate of the said decedent as in case of intestacy; and that the said Pool and Elmendorf claimed to have sold the real estate of the said decedent under proceedings in the Orphans' Court of Somerset County, for their own exclusive benefit, to the exclusion of this deponent and other creditors of the said decedent. He states that all the said proceedings were carried on without any notice having been given to him, and without his having any knowledge thereof till after the said pretended sale.

He says he is advised by his counsel and believes, that the said proceedings are irregular and void; and says that the same were undertaken and carried on, as he believes, with a design on the part of Pool to defraud him and the other creditors; and that he is informed and believes that the said pretended sale has never been completed.

He says that he is not only willing, but desirous that the said will should be admitted to probate, and that the probate already granted should be confirmed; and that, as the principal creditor of the estate, he consents thereto.

The affidavit of Cornelia B. Lawrence, widow of the decedent, was also read in opposition, stating that she is an executrix named in the will which has been admitted to probate by

the Ordinary. That the probate was applied for at her request; that she was well acquainted with the intentions of her late husband as to his testamentary dispositions; that during his last illness he repeatedly assured her that he had left in full force a will bequeathing and devising to her all his estate, real, and personal, referring, as she then understood and now believes, to the will so admitted to probate; and that he never intimated to her any desire or intention to make any change in the said will, except to substitute the name of Cornelia L. Hillhouse as executrix for that of Thos. L. Wells, executor.

Wm. B. Lawrence, by an affidavit read in opposition, says that he, with John L. Lawrence, also an executor of the will, propounded the same for probate to the Surrogate of New York; that the due execution of the said will was fully proved, and that probate would have been granted thereon by the said Surrogate, as was then declared by him, had it not been for a late statute in New York providing that the cancelling of a subsequent will shall not revive a prior one which had been retained by the testator uncanceled. That in consequence of his being advised that the said will was valid in New Jersey, the said J. L. Lawrence, to whom letters of administration were granted in New York, has always, as the deponent is informed and believes, declined to apply for letters of administration in New Jersey.

The deponent says, that having been advised that no effectual title could be made to the real estate in New Jersey, either for the benefit of the devisee or of the creditors, except under the will, he, at the request of Cornelia B. Lawrence, the universal devisee, who was also an executrix named in the will, and of Wm. B. Lawrence, Jun., who represented, in his own right, and as agent or attorney for others, 95-100ths of all the valid and subsisting debts due from the estate of the said decedent, applied to the Legislature of the State of New York for an act authorizing the Surrogate of the State of New York to deliver to the persons who had offered the same for probate, or either of them, the said will, for the purpose as stated in this deponent's petition, of having the same established in New Jersey; and that, accordingly, a law was enacted, with the knowledge and approbation of the said John L. Lawrence, who was a senator of said State, and effectually contributed to its passage, by

virtue of which the said Surrogate delivered the said will to this deponent, and he offered it to the Ordinary and Surrogate General of New Jersey for probate.

He says that in his last interview with the decedent, which took place a few days before his death, the testator exhibited to this deponent the said will, which he declared to be his last will, further saying that he contemplated no change therein, except to substitute the name of his daughter, Cornelia L. Hillhouse as executrix for that of his son-in-law, Thos. L. Wells. That, so far from the decedent's having any intention to die intestate, he at all times, during the last year of his life, declared to this deponent that he deemed it all important to his family that, in the event of his death, the disposition made by his will should take effect, so that everything might be carried on in the same way as if he were living, and the sacrifice of his real estate from compulsory sales be avoided.

He says that the existence of the said will was known to Pool and Elmendorf when the attempts were made by them, in fraud of the devisee and of the rest of the creditors, to cause letters of administration to be granted by the Surrogate of Somerset, and to sell the real estate as in case of insolvency. That no notice was given to him or to said Cornelia B. Lawrence, or, as far as his knowledge extends, to any other person interested in the estate, with reference to any intention to apply for the said letters of administration, or the sale of said real estate; and that he was ignorant of all the said proceedings until about the time he applied to the Legislature of New York for the act aforesaid.

He says that both Pool and Elmendorf had applied to and received from the administrator in New York, and from the Surrogate of the County of New York, previously to the said proceedings in New Jersey, the same dividends as the other creditors who had established their claims in New York, and whom they have fraudulently attempted, by the said pretended proceedings, to exclude from all participation in the proceeds of the real estate in New Jersey. That Elmendorf has subsequently received dividends from the said Surrogate; and that dividends have been adjudged to the said Pool, which he has been restrained from receiving by an injunction issued out of the

Supreme Court of New York, in Equity, in a suit instituted for the purpose of setting aside, on the ground of fraud, the decree rendered in his favor in the Surrogates Court aforesaid, and which injunction is still in force.

That as soon as he was aware of the said pretended letters of administration granted in New Jersey, he caused the said Frelinghuysen to be apprised of the said will, and of his intention to present the same for probate; and that in consequence thereof, as he has been informed and believes, the said Frelinghuysen has refused, and still refuses, to complete the said pretended sale made by him of the said real estate.

That until he was served with the order made in this matter, and the petition on which it was founded, he was never apprised of any intention on the part of the said Pool, or of any other person, to contest the probate of the said will; or of the said Pool, or any other person, having given notice to the Surrogates of Somerset and Middlesex, or either of them, to that effect.

The will gives and devises all his estate, real and personal, whatsoever and wheresoever, to his wife, Cornelia B. Lawrence, her heirs, executors, administrators and assigns, after the payment of his debts and testamentary charges.

The reading of the foregoing affidavits was objected to, and they were read subject to the decision of the Ordinary as to the propriety of receiving them.

Wm. H. Leupp for the Motion.

J. J. Chetwood, contra. He cited *Toller on Ex'rs.*, 17; 1 *Cowp.* 87, 92.

THE ORDINARY. I am unwilling to let this probate stand. The second section of the act respecting the Prerogative Court, (*Rev. Stat.* 203,) provides that probate of any will shall not be granted by the Ordinary until proof be made, to his satisfaction, that no caveat against proving such will hath been filed in the office of the Surrogate of the county where the testator resided at the time of his death, or that notice hath been given to all persons concerned of the application to the Ordinary for such

probate. The last clause, requiring notice, is in general terms, and cannot be confined to wills of testators who resided in this State at the time of their death. What the notice should be of an application to the Ordinary for probate of a foreign will I need not now say; it may be that the Ordinary would consider notice by publication in one or more newspapers sufficient; if so, the Ordinary should be first applied to for an order directing such publication. But in this case no notice of any kind was given to persons in this State interested in the estate of the decedent.

Again, whether a writing made by one residing in New York, and who afterwards died there, which is not a will in New York, can be a will in reference to property in New Jersey owned by the decedent at the time of his death, is a question which the Ordinary would not be willing to decide without proper notice to all parties, giving an opportunity for solemn argument.

Probate vacated.

CASES IN CHANCERY.

SEPTEMBER TERM, 1848.

WILLIAM GRANT vs. ROBERT CHAMBERS.

M. conveyed land to C., and C. gave a defeazance providing for reconveyance to M. on his paying, &c. M. filed a bill to redeem; and after answer and replication and some proofs in the case, died. G. filed a bill, stating the proceedings on M.'s bill; and that M., in his life-time, conveyed all his interest in the premises to him, G.; and that administration of the personal estate of M. had been granted to him, G.; and praying that the said suit of M. might stand revived, &c.; without saying in what character G. sought to revive. C. pleaded that H. was the true administrator of the personal estate of M., and not G. Plea sustained.

What kind of a bill should G. file, as assignee of M. after M.'s bill was filed, in order to get the benefit of the proceedings in the suit brought by M., if such benefit could be obtained in the case.

Semble, that it should be an original bill in the nature of a bill of revisor and supplemental bill.

The case appears sufficiently in the opinion delivered by the Court.

W. Halsted in support of the plea.

S. R. Hamilton contra.

THE CHANCELLOR. In Feb. 1827, James Mountier, for \$200, conveyed a house and lot to Robert Chambers; and at the same time Chambers executed to Mountier a deed of defeazance, by which it was provided, that Mountier was to continue in possession if he paid the interest, taxes, &c. and kept the premises in repair, and to have five years to pay the principal; on the payment of which, with the interest, &c., Chambers was to recon-

vey the premises to Mountier. And if Mountier neglected to pay the interest and keep the premises in repair, Chambers was to enter and take the rents and profits for the purpose of defraying the interest, &c.

After a year or more, Chambers went into possession and received the rents and profits.

In May, 1829, Mountier filed his bill to redeem, stating that he had tendered to Chambers the principal, interest, &c.

In May, 1830, Chambers put in an answer to that bill.

A replication was filed June 19, 1830.

On the 2d of July, 1830, two witnesses were examined on the part of the complainant, Mountier.

On the 20th of July, 1830, Mountier died, intestate.

On the 26th of March, 1847, a bill was filed by Wm. Grant, stating that Mountier, in 1829, exhibited his bill against Chambers stating as therein stated, and praying as therein prayed; that a subpoena was issued on that bill and served; that Chambers put in his answer to that bill; that after that cause was at issue and testimony had been taken on the part of the complainant M., the said complainant died intestate, on or about July 20, 1830, whereby the said suit became and was abated; that Mountier, in his life time, sold and conveyed to him, Grant, all his title and interest in the said premises, for the redemption and recovery of which the said bill was filed; and that, by reason thereof, he, Grant, being in equity the owner of the premises, is entitled to the benefit of the said suit, and to have the said suit and proceedings revived and put in the same plight and condition as the same were in at the time of such abatement. And, to the end that the said suit and proceedings may stand revived and be in the same plight and condition as, &c., or that Chambers may show cause to the contrary, praying a subpoena to revive, to be directed to Chambers, commanding him to appear and show cause why the said suit should not be revived, and stand in the same plight, &c. There is in this bill a clause introduced in a parenthesis, after the statement of the death of Mountier, stating that letters of administration of the personal estate of Mountier were subsequently granted to him, Grant.

But there is no express language in the bill indicating in what

character Grant seeks to revive ; whether as administrator or in his own right as the alienee of the equity of redemption.

It is not said expressly in the bill when the equity of redemption was conveyed to Grant ; whether before or after Mountier filed his bill ; but, taking the whole sentence respecting the transfer of the equity of redemption together, I presume it is intended to say that the transfer of the equity of redemption to Grant was subsequent to the filing of Mountier's bill to redeem.

To this bill filed by Grant, Chambers has pleaded that, after the death of Mountier, and on the 27th of January, 1831, administration of the personal estate of Mountier was granted to Thomas N. Hamilton, and that the bill should have been filed in his name as administrator, and not in the name of Grant.

The plea, no doubt, was put in under the idea that Grant's bill intended to pray a revivor in his character of administrator ; in which case the plea that another was the true administrator, and not Grant, would be good.

Considering the uncertainty of the bill in this respect perhaps a plea was the only safe course for the defendant ; for he could not in a demurrer allege the fact of administration having been granted to Hamilton.

If it had been certain from Grant's bill that he intended to ask a revivor in his own right, as alienee after Mountier had filed his bill, a demurrer might have been the course the defendant would have adopted.

Grant's bill being a simple bill of revivor, it may be that the defendant might have demurred to it on the ground that, if it intended to ask revivor in the character of administrator, the administrator is not the proper person to revive ; and if it intends to ask revivor in Grant's own right as assignee of the equity of redemption after Mountier's bill was filed, a simple bill of revivor would not be sufficient. But another course was preferred, it seems, by the defendant's counsel. And I think that, from the shape of the bill, he was at liberty to suppose its object to be to revive as administrator ; and in that view he might say that, if an administrator can revive in such a case, Hamilton was the administrator. And the only way he could get advantage of that would be by plea.

I do not see that, as the bill stands, the plea can be overruled.

The only thing the court can do is to allow the complainant, Grant, to amend his bill so far as to say in what character he seeks to revive ; whether as administrator or as alienee after Mountier's bill was filed.

But there is another question beyond that which had better be considered by the counsel for Grant, before he proceeds further.

His object, no doubt, is to get the benefit of the former suit and proceedings in the name of Mountier.

He should consider, then—1st. Whether Grant should ask to revive as administrator or as alienee.

2d. If he determines to proceed as alienee after Mountier's suit was commenced, what kind of a bill is necessary ; and whether this bill is sufficient, or whether, if the benefit of the former proceedings can be obtained, it would not be necessary to file an original bill in the nature of a bill of revivor and supplemental bill.

It would not be right for me to anticipate and decide these questions.

Plea sustained.

NATHANIEL DOUGHTY vs. ENOCH DOUGHTY.

Defects in an answer are not cured by the not excepting to it. Its defectiveness will have its influence on the decision of the cause, though exceptions to it were not taken.

On the question of the mental competency of the party to make a division, with his co-partner and co-tenant, of a large personal and real estate, the unconscionable character of the division will be considered in aid of the proof of incompetency.

It is not necessary that a party should have been absolutely *non compos* to entitle him to relief in such a case.

One of the parties to deeds dividing a large personal and real estate between them had been, by long intemperance and severe sicknesses, producing frequent convulsions, reduced to a very low state of weakness of body and imbecility of mind ; the other party was his elder brother, who had long been a partner in business with him, and thus in a relation to exercise great influence over him ; and the bargain was such as no honest and fair man would think of proposing or ought to be willing to accept. The deeds were declared to be fraudulent and void.

Relief in such cases does not depend on the question whether the precise degree of imbecility charged in the bill is proved. Imbecility calling for relief under the circumstances may be proved, and acted upon by the court, though it be not the degree of imbecility charged.

The lapse of twelve years before the bill was filed to set aside the deeds was held not to be, under the circumstances of the case, sufficient to establish the deeds.

The bill, filed December 2, 1845, states, that on the 6th of February, 1819, the complainant, Nathaniel Doughty, and the defendant, Enoch Doughty, being brothers, entered into a general partnership in buying and selling real estate, and in cutting oak and pine wood for market, and making charcoal, and in building vessels and sailing and selling them, cutting and sawing lumber, owning a saw-mill, and also the business of farming ; and that the partnership was so general that half of the furniture in each of their houses belonged to each of them ; and that they each delivered in, as stock, an equal sum to be employed in the said partnership business.

That it was mutually agreed between them that neither of them should or would follow the said business or any other business, during the continuance of the partnership, for their private benefit or advantage.

That the said partnership has, as the complainant believes,

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continued to this time, and still continues. That the complainant and defendant during the said partnership were seized and possessed, as such partners, of the following real estate (describing the tracts) in the county of Atlantic; being certain tracts formerly the property of Richard Price, containing about 3,932 acres, and which were conveyed by the Sheriff of Gloucester to Abner Doughty, Jr., by deed dated March 30, 1811, and by him conveyed to Daniel Doughty, by deed dated April 6, 1811, and by the said Daniel Doughty and his wife, by two deeds, one dated March 8, 1825, and the other October 18, 1832, were conveyed to the complainant and defendant; also 100 acres, being part of a survey of 900 acres made to John Tilton, recorded, &c., which they became seized of by virtue of two deeds, one from Abner Doughty, Jr. to the said Daniel Doughty, Enoch Doughty and the complainant, dated February 27, 1819, and the other from Daniel Doughty and his wife, dated October 18, 1832, to the complainant and defendant; also 788 1-2 acres, which the complainant and defendant became seized of by virtue, &c.; also 100 acres, the half of which the complainant became seized of by deed from the defendant, dated March 8, 1825; also three fourth parts of a tract called the Cooper tract, which the complainant and defendant and Daniel Doughty and Parker Cordery purchased of Richard M. Cooper and others, by deed dated February 5, 1827; also a right and interest in a certain re-survey of 3,836 acres, made for Samuel Richards on behalf of the heirs of Joseph Ball, deceased, Daniel Doughty, Parker Cordery, Enoch Doughty and the complainant, as appears, &c., also a right and interest which the said Enoch and the complainant should or might derive from a conveyance that might be made by the administrators of Joseph Ball, deceased, in pursuance of an act of the Legislature, passed December 20, 1824, &c.; also two equal third parts of a survey formerly made to Amos Ireland, deceased, containing 15 acres; also the one-tenth part of a survey made to Abner Doughty, Jr., on the 8th of Feb. 1811, for 1,567 acres, which &c.; also a survey (describing it) containing 25 18-100 acres; also a survey (describing it) containing 8 61-100 acres; also a tract of 210 acres, being part of a survey of 900 acres, made, &c.; also several tracts of land purchased

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by the complainant and defendant of Benjamin Wilkins, former Sheriff of Gloucester, as appears, &c.; to wit: the saw-mill called Clark's mill, with all the tracts adjoining said mill, with all the buildings and improvements thereon; a tract called the Monroe tract, of — acres; a lot of 30 acres, which Thomas Clark bought of Jonas Morse; a lot of 5 acres, lying, &c.; three surveys, containing 101 55-100, adjoining, &c.; a tract bought by Parker Clark of Benjamin Clark, by deed dated, &c.; a tract purchased of Henry Davis, by deed, &c.; the half of 50 acres of meadow on Nacot Creek, purchased, &c.; the other half of said 50 acres, purchased, &c.; a tract of 53 acres adjoining, &c.; a lot at Port Republic, containing 37-100 of an acre.

That the complainant and defendant were during said partnership seized and possessed of considerable other real estate; and also of various personal property; but that the complainant, not having possession of the title papers, nor of the partnership books, cannot set forth the same; but prays that the defendant may set forth the same. That, about the 1st of June, 1832, the complainant was taken sick, and continued so for a considerable time; and he is informed and believes, that during the latter part of June, 1833, and the month of July following, he was deprived of his right reason, and was of unsound mind and totally incapable of transacting any business or of the government of himself and management of his affairs; and he is informed and believes, that he continued in such condition for some time and up to January 1, 1834; and he charges, that while he was so afflicted and laboring under such unsoundness of mind, the defendant possessed himself of all the title papers of the partnership property and of the partnership books; and that he has refused to permit the complainant to inspect the same, and refused to render any account of the partnership property.

That on the complainant's recovery from his said sickness and restoration to his reason and understanding, he found to his surprise that the defendant had taken possession of all the partnership property of a personal nature, a portion of which the complainant can now recollect, consisting of one-third of the schooner Sun, five-sixths of the schooner J. R. Rapley, one-third of the schooner

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Uriah, one-third of the schooner Harriet, one-sixth of the said schooner Uriah, six mules, four horses, one four-horse wagon, three two-horse wagons, one sulkey, 1,000 cords of pine wood ready for market, on a landing, 1600 cords of wood in the woods, ready to be made into charcoal; also a quantity of sawed lumber, ship plank, and flitch stuff of the said saw mill, and about 1500 bushels of charcoal ready for market. That on the complainant's making application to the defendant, the defendant to his great surprise informed him that he had, on the 4th of July, 1833, not only executed a bill of sale of all his right to the said personal property, but also a deed for all his right in the said real estate. That he then stated to the defendant that he had no knowledge of executing any such bill of sale or deed; and that, if such was the case, he the defendant well knew that the complainant had never received any consideration therefor, and that both were fraudulent; and the defendant then acknowledged that the complainant had received no value for the said property, and promised, or gave the complainant to understand, that he would re-convey to the complainant the said personal property as well as the said real estate; that, the defendant being a brother of the complainant, and the complainant placing reliance in his declarations, he suffered it to remain; believing that the defendant would fulfil his said promise, and would not undertake to strip him of his property; the wives of the complainant and defendant being also sisters.

The bill charges, that while the complainant was sick and incompetent as aforesaid, and the defendant was endeavoring to get the said bill of sale and deed executed, the complainant's wife opposed the execution thereof; that the defendant informed complainant's wife that he was satisfied the complainant could not live, and that, as the complainant had no children, he thought that he, the defendant, and his children should have the property of the complainant, as they by their exertions had made it, and as the complainant was incompetent to make a will, and that, should he die in such condition, the children of Daniel Doughty, another brother, would get a portion of the complainant's property. That the complainant's wife still resisted the execution of any writings by the complainant, and the defendant got

the complainant away from his home and procured the execution of the said bill of sale and deed, which deed was not executed by the wife of the complainant, and that the complainant has no knowledge or recollection of signing any papers during the said months of June or July 1833, nor of anything that transpired during the said months, or long before or long after the said time.

That he has never received any consideration money from the defendant for the said personal property or the said real estate; and that, notwithstanding the said deed, the defendant and complainant continued to cut upon the said property, and use and occupy the same, after the same manner as had been done previous to June 1833, up to July 1844.

That in or about July, 1844, the defendant ordered the sawyer at the saw mill of the complainant and defendant not to saw any logs the complainant should have brought to the said mill, and took the exclusive possession thereof, and forbid the complainant and his workmen from cutting upon or using any of the aforementioned premises, and threatened to prosecute the complainant and his workmen for the same.

That the defendant caused a suit to be instituted in the Circuit Court of Atlantic county, against the complainant, in September, 1845, for \$2,000 damages, for timber and sawing of lumber cut upon said premises and sawed at said mill. That up to this period the complainant always believed the defendant never intended to enforce the said bill of sale or deed. That no settlement of the partnership accounts has ever been made; and that the defendant has collected in the partnership debts and applied the same to his own use, which he is enabled to do by reason of his possession of the books of the partnership. That the defendant is now engaged, with a number of hands, on a part of the said property, cutting wood for coaling and logs to be sawed into lumber; and that the complainant is informed and believes that no account is kept by the defendant of the amount of wood cut or the quantity of lumber sawed; that it is hurried off to market, &c.

The bill prays an account of the partnership dealings and transactions from the commencement of the partnership, and

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of the moneys received and paid by the complainant and defendant in relation thereto, and that the said deed and bill of sale may be set aside as fraudulent and void, or the defendant be decreed to re-convey to the complainant; and that, in the mean time, the defendant may be enjoined from collecting or receiving any of the partnership debts, and that a receiver may be appointed; and that the defendant may be enjoined from further prosecuting his said action at law, and from cutting or working upon the said premises or the said saw mill

On the filing of this bill, an order was made directing the complainant to give notice of a motion for an injunction.

On the hearing of the motion the answer of the defendant was read.

The answer, after stating the nature of the partnership, says, that the partnership continued until July 2, 1833, when it was dissolved by mutual consent as afterwards in the answer particularly set forth.

It states the manner in which the partnership business was done; that in regard to each other each partner conducted their partnership business in a loose and general way; each seeming to confide in the other that at a proper time a just settlement would be made, and each bear a share of the losses and take a share of the profits according to his care and labor and the amount he had from time to time invested in the business of the firm.

That for two years and eight months during the partnership, commencing in February, 1824, he was Sheriff of Gloucester; that he still gave his whole time and attention, when not engaged in the duties of his office, to the partnership business; that the proceeds of his said office, amounting, to the best of his knowledge and belief, to more than \$7,000, were used and invested in the partnership business, and went to increase the joint property and profits.

That prior to July, 1833, the complainant had at different times mentioned to him that he would like, before a great while, to dissolve their partnership and divide the partnership property equitably between them; that he, the defendant, always answer

ed in such case that he was at any time ready to dissolve whenever the complainant desired it; and that he would at any time join him in examining into the state of the partnership business, accounts and property, for the purpose of making a dissolution and equitable division of the joint property.

That after the complainant had thus mentioned to him at different times the subject of dissolving the partnership and dividing the property, the complainant, on or about July 2, 1833, made to him a distinct proposition for such dissolution and division, and the same was considered and debated between them at length; the terms proposed by the complainant were, without much if any alteration or modification, agreed upon between them. That it was then agreed between them that the partnership should be dissolved, and that a part of the real estate should be taken by the complainant and a part by the defendant; that certain parcels of real estate should not be then divided, but continue to be held by them as tenants in common; that the defendant should convey to the complainant all the defendant's right and interest in the real estate so to be taken by the complainant, and the complainant should in like manner convey to the defendant all the complainant's interest in the real estate to be taken by the defendant; and that the consideration to be expressed in each deed should be \$2,000. That the defendant should lease and convey to the complainant the right to cut wood and timber for his use on certain lands in the answer after specified; that the complainant should take, as his own separate property, certain personal estate in the answer after mentioned; and that the residue of the joint personal property should belong to this defendant; that this defendant should have all the debts coming to the firm on book accounts or notes, and should pay all the debts against the complainant and defendant in Egg Harbor or Galloway, or in New York or Philadelphia; which, as he avers, comprised all or the chief part of the debts of the firm.

That in pursuance of said agreement and understanding he did, on the 4th of July, 1833, by deed by him executed and delivered to the complainant, dated July 2, 1833, convey to the complainant all this defendant's interest in certain tracts or parcels of land belonging to the firm, which were the same

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tracts which the complainant had himself selected and chosen for that purpose ; by means whereof the complainant became the sole owner in fee thereof, and took them to his own use, and hath ever since held and enjoyed the same ; that this defendant has not the said deed, nor any copy thereof, and cannot therefore here set forth a particular description of the lands conveyed thereby.

That at the same time at which he executed and delivered to the complainant the deed first mentioned, to wit, on the 4th of July, 1833, the complainant, in pursuance of their said agreement for dissolution and division, did, by deed by the complainant then executed and delivered to this defendant, dated the said 2d of July, 1833, convey to this defendant all the complainant's interest in certain tracts of land and real estate in said deed described, being the tracts of land particularly set forth in the complainant's bill of complaint ; that the said deed was, on the same 4th of July, 1833, acknowledged before Daniel Lake, Esq., a commissioner, &c., and was, on the 2d of August, 1833, recorded in the Clerk's office of Gloucester.

That at the time of the execution and delivery of the last mentioned deed the complainant had not any right or title to one of the tracts therein mentioned, to wit, the tract in the said deed mentioned as land which might or should be conveyed by the administrators of Jos. Ball, deceased, by virtue of an act of the Legislature passed Dec. 20, 1824.

The answer makes certain allegations as to this tract.

That the other tracts mentioned in the deed from the complainant to him were a part of the partnership property, and that by virtue of the said deed he became the owner in fee of all the complainant's interest therein, and thenceforth held the same as sole owner thereof.

That the consideration money mentioned in each of the said deeds, the one from the complainant to him, and the other from him to the complainant, was \$2,000 ; but that no consideration was paid by either to the other ; the sole consideration being the mutual and simultaneous execution and delivery of the said deeds, and the desire and purpose of making a fair and just division of the partnership property.

That, in further carrying out their said agreement for dissolution and division, the complainant, on the 4th of July, 1833, by bills of sale under his hand and seal duly made and executed, conveyed to him five-twelfths of the schooner J. R. Rapelye, one-twelfth of the schooner Uriah, and one-third of the schooner Sun.

That, for the purpose of making the sale and transfer of the said shares in the said vessels and making enrolment thereof, it was necessary for them to go to the office of the Collector for that District ; and that they accordingly called on Doctor Mahlon D. Canfield, then Collector, and informed him of their wishes ; and at the request of the complainant and this defendant, the said Canfield drew the said bills of sale, and the same were executed in his presence and signed by him as a subscribing witness ; that the shares of the said vessels so conveyed were estimated between the complainant and this defendant, and the estimated value was put into the said bills of sale as the consideration thereof, which was either paid by this defendant to the complainant or allowed and satisfied to him in the settlement and division of their partnership business and property.

That after the said deeds for the said lands and the said bills of sale for the said shares in the said vessels were delivered, and on the 6th of July, 1833, according to the best of this defendant's recollection, the complainant himself drew up and prepared an agreement in writing for the dissolution of the said partnership, and for a further division of certain partnership property and a settlement of the partnership accounts and debts, to be signed and executed by him and this defendant. That a copy of the same was then made by this defendant's son, John H. Doughty, and was, on the said 6th of July, signed by the complainant and this defendant, under their hands and seals ; but bore date, nevertheless, on the said 2d of July, on which day, as before stated, the proposition for a dissolution and division of the partnership property was made and agreed to. That this last agreement, so made and executed, is as follows : " To all to whom these presents may come : It is agreed between Enoch Doughty and Nathaniel Doughty, both of, &c., have this 2d day of July, A. D. 1833, dissolved all business existing be


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tween us by mutual consent ; and the said Enoch Doughty is to have all the debts coming to them on book account or on notes of hand, and the said Enoch Doughty is to pay all the debts that is against the said Enoch Doughty and Nathaniel Doughty in Egg Harbor or Galloway townships, Philadelphia or New York, so that the said Nathaniel Doughty has nothing to pay for any labor that has been done previous to this day, and he is to have two hundred cords of pine market wood on Absecom Landing which the said Nathaniel Doughty shall choose, also the two grey horses and gearing, a two-horse wagon, the chair and harness and the old sorrel horse ; as witness our hands and seals the day and year first above written." The defendant says there were two copies of said agreement executed at that time, and one was taken by each of them. And he believes and charges, that the complainant, when he prepared and filed his bill, had, and that he still has a copy in his custody or under his control ; yet he has not set the same forth in his bill, nor made known to the court the existence of such instrument, and has therein shown himself unwilling to set before the court the whole facts and truth of the case. That, in further carrying out their said agreement for division of property and dissolution of partnership, he and the complainant did, on or about the said 6th of July, make and execute a certain other agreement in writing, under their hands and seals, which, nevertheless, also bears date the said 2d of July ; and that by that agreement this defendant leased certain real estate therein mentioned to the complainant, with the right to cut wood thereon, and made further stipulations with the complainant respecting certain other of the personal estate of the said partnership to be taken and held by the complainant for his own use ; which agreement is as follows, to wit : " To all to whom these presents may come : I, Enoch Doughty, of, &c., of the one part, doth agree to release unto Nathaniel Doughty, of, &c., of the other part, the whole of the cleared land except where the Surveyor's house stands, on the south side of the mill, and all the privileges of cutting market wood, that is to say, between the Branch and the Absecom road, from the field down to William Chamberlain's line near where the May's landing road puts off,

that is to say, on the south side of the main branch and on the north side of the road, for five years from the date, or as long as he may want it himself or his wife Sarah Doughty; and Nathaniel Doughty is to have the cedar for his own use, and also oak timber for firewood, and to have what lumber he wants for his buildings that is already sawed; and said Nathaniel Doughty is to have his equal half part of all the carpenter's tools, vessel screws, plows, harrows, shovels, forks, &c., blocks and rigging, and half part of the salt they have now on hand, together with the half part of all the stock of store goods now in possession, and the iron that is at James Smith's, Absecom, and also at home; as witness, &c." That the said agreement was prepared under the direction of the complainant, and is in part in the complainant's own hand-writing, and that a duplicate thereof was also executed, and then and there given to the complainant.

That, immediately after the execution of the two last mentioned articles, the said Nathaniel delivered over to him sundry deeds, papers and writings relating to the property which they had held as partners, and also the before mentioned account book which had been kept at the store of the firm, as before stated; and that the complainant retained certain other partnership papers for himself; that this defendant then intending to keep said account book as his own thereafter, as it was intended by the complainant that he should, immediately wrote therein as follows: "Enoch Doughty began to keep the account in this book alone, Doughty's mills, July the 6th, 1833." That from that time forward he conducted his business separately and on his own individual account, and made his entries in said book, and kept the same accordingly.

That when he and the complainant made their aforesaid agreement for a dissolution and for a division of their partnership property, and when they executed the said deeds, bills of sale, agreements and writings for the purpose of carrying out their agreement for such dissolution and division, the complainant was of sound mind and understanding and in full possession of his reason, and was in all respects capable of managing his estate and property and of making contracts of any nature whatever in relation thereto.



That the defendant fully believes, and so he charges the truth to be, that the said agreements, deeds, bills of sale and contracts between this defendant and the complainant for the dissolution of their partnership and the division of their partnership estate and effects were made and executed by the complainant while in full possession of all his mental faculties, and with a complete knowledge on his part of the nature and effect thereof, and that all the allegations of the complainant's bill to the contrary are, as this defendant believes, wholly untrue.

That he has no recollection that the complainant was taken sick in the latter part of June, 1832, as in the bill is mentioned; and he never knew or heard that in the latter part of June, and in the month of July, 1833, the complainant was deprived of his right reason or was of unsound mind and incapable of the government of himself and management of his affairs, as is stated in the bill; and he does not believe that the complainant was in such a state of unsoundness of mind, or that he was deprived of his reason or incapable of the government of himself or management of his estate; and he wholly denies that such was the case; and charges that such allegations are made in the bill without foundation in truth, and for the purpose of avoiding his contracts made by him in a deliberate manner and with a full understanding of their nature and effect.

He says, that at the time the partnership was dissolved the complainant had full knowledge of how their business stood and of the partnership property, debts, dues and liabilities; and, possessing such knowledge, he made to this defendant, as before stated, a proposal to dissolve partnership and to divide their property in the manner before stated, and the same was accordingly done. He therefore conceives that, as the complainant neither made nor sought nor desired a statement of the partnership accounts before the dissolution, nor at the time thereof, and having agreed to and made a dissolution and a division of estate, he cannot now complain that he never saw any statement of accounts or that this defendant has never made any.

He says he has repeatedly and at different times requested the complainant to account to and settle with him for various matters and transactions had and done between them since

the said dissolution ; but the defendant has always refused to do so ; and, in order to compel a settlement, this defendant was at length, and after the lapse of several years, compelled to commence a suit, and did sue the complainant at law ; which suit is still pending.

He says it is not true that the complainant ever stated to him that he, the complainant, had no knowledge of executing the said deed and bills of sale, or that he the complainant had never received any consideration for the same, or that they were fraudulent ; nor did this defendant ever acknowledge or say to the complainant, or to any other person, that the complainant had received no value for the said property so conveyed by him ; nor did this defendant ever promise the complainant or any other person, or give him or them to understand, that he would re-convey to the complainant the said personal and real estate so conveyed by the complainant, as is alleged in the bill. On the contrary, he believes and charges the truth to be, that the complainant executed the said deeds and bills of sale with a full knowledge and understanding of their nature and contents, and that he received from this defendant a good and valid consideration therefor, and such as was agreed upon between them, and was at the time perfectly satisfactory to the complainant, and was, in truth, of his own proposing, being the matters hereinbefore set forth.

He denies that he informed the complainant's wife at any time that he was satisfied that the complainant could not live, and as he had no children this defendant thought that he and his children should have the property of the complainant, or that as the complainant was incompetent to make a will, should he die in that condition the children of their brother Daniel would get a portion of the property to which they were not entitled.

He says that the wife of the complainant never did, to the best of his recollection and belief, object to or oppose her husband's signing and executing said deed or the said bills of sale. He says it is not true that he got the complainant away from his home and procured the execution of said deed and said bill of sale. On the contrary, he says and charges, that the terms of dissolution and division of partnership property before mentioned were talked about and discussed at different times and places,

and in part at the complainant's own house and in the presence of complainant's wife and without objection on her part. That it was finally agreed that the said deeds and bills of sale should be executed, and that the wives of the complainant and this defendant, respectively, should join their husbands in the execution of the deeds for the conveyance of real estate to be executed by them and hereinbefore mentioned ; that it was agreed that the deeds should be prepared by this defendant's son, John H. Doughty, under the direction of the complainant and this defendant, and that then the complainant and this defendant, with their wives, should execute and acknowledge them before Daniel Lake, a commissioner, &c., who resided about four miles from the complainant's house. And as the complainant and defendant, in order to complete the transfer of the shares in the said vessels, must go to the house of the said Doctor Canfield, Collector as aforesaid, it was thought best to do all the said business at one time, as the said Collector lived a little beyond the said Daniel Lake, and on the same road ; that in pursuance of the said understanding the said deeds were drawn and the names of the wives were inserted therein ; that, at the time agreed upon, the 4th of July aforesaid, this defendant and his wife went to the house of the complainant, as the complainant had himself requested ; that at the house of the complainant, on that day, the said deeds were examined and read by the complainant and his wife, and they prepared to go with this defendant and his wife to execute and acknowledge them as aforesaid ; but, as they were about starting, some friends came in as visitors to the complainant's house, and it was then agreed that the complainant and defendant should go alone and execute said deeds, and that their wives should remain with their visitors, and execute the deeds at another day ; that accordingly the complainant and this defendant went first to the house of the said Doctor Canfield, who drew the bills of sale, and they were then executed by the complainant in the presence of the said Canfield, who signed the same as a subscribing witness.

That the complainant and this defendant, also, at the same time, executed the aforesaid deeds, and the said Canfield also signed them as a subscribing witness ; that afterwards, on their

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return home, on the same day, they stopped at the house of Daniel Lake, and there, before him, acknowledged the said deeds; that afterwards, the wife of the complainant and the wife of this defendant, who are sisters, agreed together, as this defendant has been informed and believes, that neither of them would sign the said deeds; and as neither the complainant nor this defendant deemed it a matter of great moment, or one likely to create difficulty, nothing further was said about it. That the said two articles before mentioned, to wit, the article of dissolution and the article by which this defendant leased certain land to the complainant and assigned certain of the personal property of the partnership to him, were both executed at the defendant's own house, and in the presence of the complainant's wife and other persons; that the complainant himself drew or assisted to frame the said articles; and Chas. C. Murphy, one of the subscribing witnesses to the said articles, is a nephew of the complainant, and then lived in his family; that the complainant's wife did not then, or at any other time, raise any objection to the execution of the said instruments; yet they were read and executed in her hearing and presence.

He says it is not true that notwithstanding the said deed. the complainant and the defendant continued to cut upon the said property and use and occupy the same after the same manner as had been done previous to June, 1833, up to July, 1844. On the contrary, he says that immediately after the delivery to him by the complainant of the said deed dated July 2d, 1833, and conveying to this defendant to his own use in fee simple all the complainant's right in the several parcels of land therein described, he, the defendant, took the same into his possession as his own separate property, and has ever since held and used the same as his own; that neither the complainant nor any other person has cut thereon or used the same, unless by this defendant's consent, without being held by him as trespassers. He says the complainant has, at different times since the delivery of said deed to him, cut wood on said lands, but only by permission of this defendant, and in such manner and at such times and places as this defendant permitted, or if he has cut without such permission it has only been as a trespasser. That

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for the wood and timber so cut he has always expected the complainant would pay him, the same as other persons did. And this defendant repeatedly applied to the complainant to account with him for the wood and timber so cut, and to pay him for the same, and to settle their accounts in regard to other business transactions between them; and the *defendant* (meaning the complainant) never alleged to this defendant that he had right to such land as part owner thereof until about the time this defendant sued him at law to obtain a settlement of the accounts standing between them. That the complainant has, also, since the said dissolution of partnership, had considerable lumber sawed at this defendant's mill, and has had sundry other dealings with this defendant, by means whereof he has become largely indebted to this defendant. That he has also dealt considerably with the firm of E. Doughty & Son, composed of this defendant and his said son John, at their store and in other ways, and is now indebted to them in a considerable sum; that, the complainant having been repeatedly requested to come to an account and settlement of said accounts with this defendant and with E. Doughty & Son, and to pay up what was in arrear and due to them, and having always refused or neglected so to do, this defendant and the said firm were at length compelled to resort to compulsory measures. That, accordingly, this defendant directed his sawyer at his saw mill to saw no more lumber for the complainant without orders from this defendant, and forbid the complainant and his workmen from cutting on said lands; and this defendant and the said E. Doughty & Son each commenced an action in the Circuit Court of Atlantic against the complainant, to recover from him the sums so as aforesaid due from him to said plaintiffs, and which he always neglected and refused to account for and pay.

He says that, immediately after the said dissolution of partnership and after the manner of dividing the partnership property had been settled and agreed on, and the said deeds, bills of sale and articles had been executed, the complainant took into his possession, as his own separate individual property and for his own use, all the personal property which had been assigned to him in such division; that the complainant also took posres-

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sion of, and kept and used as his own, all the tracts or parcels of land and real estate which, according to the division of the partnership property so as aforesaid agreed on, had been set off to him as his share, and in and to which this defendant had relinquished and conveyed all his right, share and interest to the complainant by the aforesaid deed executed and delivered as aforesaid to the complainant by this defendant, and dated on the 2d of July aforesaid; that the complainant has ever since held and enjoyed the said lands as his own and to and for his own separate use and benefit; that the complainant has also cut and used all the wood and timber on the lands leased to him by this defendant and mentioned in said lease or agreement of said July 2d; that within a few years past, defendant thinks about five or six years ago, the complainant sold and conveyed to Gilbert Miller a part of said lands so released and conveyed to him; that Miller has taken possession of the part so sold to him and fenced it, and has erected a dwelling house thereon, which is now occupied by said Miller's tenant; that, ever since the dissolution of said partnership and the division of said property, the complainant has also carried on his own business separate and apart from this defendant, and has dealt on his own account and for his own benefit; and that this defendant has ever since said &c., held, possessed and enjoyed as his own separate property all the estate, real and personal, assigned to him in said division; that this defendant possessed, used and occupied, the said real estate according to the nature thereof, part being land used for agricultural purposes, and part being woodland.

That he has always paid all taxes and assessments thereon, and defended the same against trespassers; that, the title to a part of the same having been in dispute before and at the time of said dissolution, he was afterwards compelled to assert and defend the same by suits or by arbitration; and he did so at his own proper costs and charges, and bore the labor and care of such proceedings; that a part of the said real estate was a tract of land with a saw mill thereon, which mill this defendant from time to time repaired; and finally, deeming it his interest to do so, he took said mill down to its foundations and erected it anew, and made it for a single saw, whereas it was before for two saws; that he also al-

tered the dam by cutting it and building flood-gates in it ; all which he did at his own proper costs and charges, and of his own mere motion, without consulting or advising with the complainant or any one else ; and the complainant, though living near, and seeing and knowing what this defendant was doing, did not in any way interfere or make any objection, or advance any claim or pretence of right ; that this defendant rebuilt said mill and made said alterations in the dam in 1841 ; that this defendant, also, some time in 1836, sold and conveyed about 100 acres of the land so relinquished and conveyed to him by the complainant as part of the partnership property by the deed hereinbefore mentioned.

That in dissolving said partnership the complainant took upon himself no burden or risk ; that the real estate assigned, and which he has held as his own under the said deed from this defendant, was clear of all incumbrance ; that the complainant had no partnership debts to pay, nor partnership dues to settle and collect.

He says he has taken no more of the personal property than was apportioned and assigned to him in and by said dissolution ; and has taken and held and now holds only so much of the real estate as in said division and dissolution was assigned and apportioned to him ; that he has paid the partnership debts, and has collected moneys due the partnership on notes or book account, and all that are of any importance or can be collected, so far as he knows ; but the amount thereof he is unable to state.

He then states how he is using the real estate and the wood and timber thereon ; that he is cutting it for market, and is committing no waste ; but that his course in the use of the said lands, and in cutting wood and timber thereon, is the same now as it always has been heretofore. He denies that the wood is hurried off to market, or that there is anything unusual in the places or manner of chopping ; and he denies all desire or intention to commit waste. He says he is fully able and willing to pay the complainant all moneys, if any, to which the complainant may be found entitled upon a just account and settlement between them ; and that he is willing at any time to come to

such account, and has frequently sought it from the complainant, but without success.

He says that the suit commenced by him in the Atlantic Circuit is for causes of action which have arisen since the said dissolution of their partnership, and is in no respect for any of their partnership business or transactions, or for any causes of action arising thereon; and he believes and charges that upon a just settlement of their accounts the complainant will be found largely indebted to him.

The motion for an injunction was argued at the term of December, 1846.

Mr. Jeffers in support of the motion.

P. D. Vroom contra. He cited *Dickens*, 667; 3 *Br. Ch.* 621; 2 *John. Ch.* 122; *Eden on Inj.* 221; 2 *Ves & Beam*, 329; 15, *Ves.* 10; *Gow on Partnership*, 128, 9; 2 *Anstruther*, 453; 2 *Merrivale*, 405; 1 *Sim. & Stuart*, 130; 2 *Mad. Ch. Pr.* 191, 2.

THE CHANCELLOR. The case made by this bill, unaffected by the answer, would present so strong a case of fraud that the court would be disposed to deal vigorously with it, and to grant an injunction to the extent prayed. But the answer of the defendant, though not satisfactory, is perhaps sufficient to put the main charge of the bill, the mental incapacity of the complainant at the time of the alleged dissolution of the partnership, in doubt. It is a case in which the complainant's title is disputed. And if, in view of the answer, the complainant's case was more clear, the result would only be, that for the present the partnership would be considered as continuing; and in that view of the case, considering the nature of the property, and that the defendant, as is shown by the answer, is only cutting for market, in the same way in which it was done when the partnership confessedly existed, and that no charge is made in the bill of inability in the defendant to respond, and his ability being expressly shown by the answer; it appears to me it would be going too far to break up the

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business entirely, by restraining the defendant from cutting.

As to the prayer for an injunction against the defendant's further prosecution of his suit at law, I think it should be granted. The bill charges that, notwithstanding the deeds of dissolution, they both, after the complainant's recovery, went on cutting and hauling to the mill as before; and that the suit is for timber and sawing lumber. The answer admits that the complainant has at different times since the dissolution cut on said lands, but says it was only by permission of the defendant, or, if he has cut without such permission, it has only been as a trespasser; that he, the defendant, has repeatedly requested the complainant to account and settle with him for various transactions had between them since said dissolution; and that, in order to compel a settlement, the defendant was at length, and after the lapse of several years, compelled to commence a suit. And at another place the answer says, that the complainant has since said dissolution also had considerable lumber sawed at the mill and has had sundry other dealings with the defendant, by means whereof he has become largely indebted to him; that the complainant having been frequently requested to come to a settlement of said accounts, and having always refused and neglected, the defendant at length directed the sawyer at the mill to saw no more lumber for the complainant, and forbid the complainant and his workmen from cutting on said lands, and sued the complainant to recover said sums. These parts of the answer are sufficient to apprise the court that the suit is for matters connected with the subject of controversy here; and they at the same time furnish something of corroboration to the statements of the bill. It is evident the suit at law brought by the defendant is founded on the assumption of the validity of the deeds of dissolution and division, the matter in controversy in this court.

An injunction will be allowed restraining the defendant from the further prosecution of his said suit at law.

The cause proceeded; and was brought to hearing on the pleadings and proofs, at the term of June, 1848.

The testimony taken on both sides is very voluminous. The following abstract gives the substance of it:

TESTIMONY FOR THE COMPLAINANT.

Mrs. Ann Murphy, for the complainant. She is a sister of the wives of complainant and defendant. She went to live in complainant's family in 1828, and lived there till Sept. 1834; complainant was sick several times while she lived there. Recollects that he was very poorly in the spring and summer of 1833. During that time he at times was not capable of doing any business, in her opinion; he was at that time under the Doctor's hands at intervals. Defendant was frequently at complainant's house during his sickness; defendant came there to get complainant to go down shore to sign the deeds; she expects to defendant's; she knows nothing about the deeds. This was in July, 1833; complainant was in the room, on the bed, lying down, when defendant came. At that time she did not consider complainant fit to do any business. At that time complainant's wife did object very highly to complainant's signing any papers. She has no recollection of seeing defendant's wife that day. Complainant's wife followed defendant into the room where complainant was. The company came about the time they came out of the room. The company were Sherman Clark and his wife and Susannah Clark. On that occasion did not see defendant's wife there. Witness was there all day. Did not hear complainant's wife say she was going away that day. Saw complainant go out of the yard with defendant that day; defendant brought complainant back in a wagon, towards night; it was after dinner when they started. Complainant was poorly all that summer. Complainant has no children. Defendant had five children; his son John was born in Nov. 1816; John was off at school before 1833, and defendant's daughter Rebecca was at boarding school in 1833. In August, 1833, she went with complainant to Mark Basset's; complainant's wife was not well enough, and witness had to go with him. On our return we came by Daniel Lake's; complainant called for the deeds, and Mr. Lake told him that defendant had taken them away. Mr. Lake is dead. Complainant, during the sickness I have spoken of, was attacked with fits; witness saw him have one some time in the spring. The reason she went with complainant was that his wife did not like to trust him to go alone, as she did not think him fit to be trusted alone

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Recollects that defendant and his son John were at complainant's house in Aug. 1833, while complainant and his wife were gone to camp meeting. They were overhauling books which were in the desk. Does not know that any books were taken from the house.

Cross-examined. It was on the 4th of July, 1833, that defendant came to complainant's and took him to sign the deeds; there were no papers read in her presence that day. Defendant generally went with complainant to Absecum, when complainant was able to go. Complainant built a house on the Peggy Leeds' place; thinks it was in the spring before witness moved away from there. He was at work at it then.

In chief. After July, 1833, recollects Daniel Lake's coming to complainant's to get his wife to sign a deed. She refused. Witness heard no deeds read on that occasion. On the 4th of July, 1833, she did not consider Nathaniel capable of transacting such business as executing a deed. To witness' knowledge complainant's wife was always dissatisfied with complainant's executing a deed to defendant, and so expressed herself. In witness' opinion, complainant did not seem to know the importance of what he was doing in executing the deed to defendant. During the spring and summer of 1833, complainant's wife and witness had to be up considerably with him at night; he was queer at nights, as well as days; he would not let any body sleep. A good while after that, the wife of defendant sat up with complainant, with witness. She has heard complainant call on defendant, since July 4, 1833, to give him up his deeds, and say to defendant he had taken advantage of him. Thinks she has heard it more than once. Has often heard complainant's wife say to defendant that he had taken the advantage of them in the execution of the deed. Defendant and complainant's wife used to quarrel every time defendant came over there, for a long time.

Cross-examined. Complainant had John Collyer and Charles Murphy hired before and after July, 1833. Complainant had

cord wood cut after that time, she guesses, and she expects they carted it to the landing. After that time, complainant's team used to cart logs. She can't recollect any particular time in the spring and summer of 1833 when complainant was confined to his bed. He was up and down ; he was very queer during that time ; he used to sit about and lay about. Complainant has had workmen employed in making repairs about his house since July, 1833 ; and has built additions to his house since then. She has seen complainant's team carting wood by where she now lives, since 1833, every year, through the working part of the season ; not every day, but now and then ; complainant sometimes carts himself. He has built a small house on the road from Absecum to May's landing since witness left living with him.

John Collyer, for complainant. Is 61 or 62 years old. Has lived in complainant's family above 14 years ; lived there in the years 1832, 3 and 4. Complainant was sick in 1833 ; he was also sick in 1832. Defendant used to be there, off and on, during complainant's sickness ; should say complainant had not, during the spring and summer of 1833, his proper senses at times. Witness sometimes followed him when he went from home. When he followed him he did not consider him capable of taking care of himself. Witness had known him well before that time ; he was a smart man at one day. Witness had gone with him by water before that time ; he appeared to be stupid and dumb during the spring and summer of 1833 ; he was confined to his bed at times. During that spring and summer witness did not consider him capable of doing any business. Recollects that defendant came to complainant's in the summer of 1833 to get him to go down shore to execute a deed. It was on the 4th of July, 1833 ; witness saw them go away together. On that day and at that time witness did not consider complainant capable of doing any business. Recollects on that occasion defendant's handing a paper to complainant's wife to look at. Witness believes she objected to complainant's signing any papers at that time. While complainant's wife was reading the paper defendant had handed her, defendant, without her handing it to him, took it out of her hand. If defendant's wife was there at that

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time witness did not see her. He did not see her there that day that he recollects of. There was company came there about the time complainant and defendant went out. Saw complainant when he came back; did not consider him better qualified to do business when he came back than he was when he went away. He went to bed sick when he came home; defendant brought him back in the same wagon they went in. During that spring and summer complainant frequently had fits. After the 4th of July, 1833, he recollects the complainant's going down to Daniel Lake's to get his deeds, and he appeared to get bewildered; witness tracked his sulkey wheels. He started to go to Daniel Lake's, the women said. Witness tracked the sulkey wheels round the old road by Ingersoll's branch, in the direction of Daniel Smith's. He turned off into a parcel of log roads, and then came home again. After he got home, Bill Pine took him down to Lake's; Pine is not now living. Witness has heard complainant's wife call on defendant to give up the deed for the property or make satisfaction, or they would commence a suit against him, or some such talk as that, witness believes. Complainant's wife expressed a great dissatisfaction from the beginning about the conveyance from complainant to defendant for the property.

Cross-examined. He now lives with complainant, as a hired man. Complainant did not do any business of any account during the spring and summer of 1833. Once in a while he used to ride down to Absecum. Once he tried to run away to come down to Absecum. Complainant had spells of sickness several times previous to the spring of 1833. He was worse then than in 1832. He was confined to his bed the first time; the last time he ran about like a crazy man; he could not run the first time.

The reason he says complainant was not capable of doing business on the 4th of July, 1833, was because he was half crazy that day, and had been half crazy for a month before. The reason I considered him crazy on that day was because he rolled up his eyes and stared up about the house; and if you asked him any question he could not tell you what to do, and had been so for a month before. During said month complainant went to Abse-

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cum sometimes. It was a good while after the 4th of July, '33, before complainant commenced doing business; and is hardly capable now. Witness lived with him more than five years after July, 1833. When complainant and defendant got back on the 4th of July, 1833, witness was in the field, and came to the house. When he got to the house he asked complainant's wife where complainant was. She said he was sick and gone to bed. Witness did not see him that night after he came home.

In chief. After July 4, 1833, complainant continued in that wild manner spoken of in witness' cross-examination for some time, and continued crazy in the manner therein spoken of. Witness had to watch him at nights; and he got away from witness one night. Witness got asleep, and complainant slipped out of the door. His wife called me, and I caught him back of the orchard, near the pond. Witness saw him on the 5th of July, '33; he was pretty much the same as on the 4th. During complainant's sickness, in 1833, witness used to see defendant there very frequently.

The house on the Peggy Leeds' place was raised late in the fall of 1833.

During the time defendant was Sheriff, the complainant conducted the business at home, was the business man, and had the charge of the business generally, and had all the say. Complainant carried on the saw mill also at that time.

Cross-examined. It was in the fall of 1833 that the complainant repaired the old barn at his house. He moved the old barn across the road and repaired it. During the time defendant was Sheriff, complainant did the business principally about the place; I mean both farms. When defendant was at home he did his share of the business on the two places. They were as one man; what one did the other did not object to.

It was in 1833 that complainant ran away from him in the night and he found him back of the orchard. Witness lived at complainant's while defendant was Sheriff; he worked on defendant's place as much as he did on complainant's.

Jos. Hackney, for the complainant. Is 39 years old; was at

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work at complainant's, as a carpenter, in the months of June and July, 1833. Recollects complainant's having a very severe fit the last of June or first of July, 1833. Witness did not think him for a day or so after the fit, at any time during day, competent to do any business whatever. For days afterwards he had these fits, when he was not competent for the transaction of any business whatever. Some days he appeared to be right; and part of other days he did not appear to be right. Can't say how long after the complainant had had that fit in the last of June or first of July, 1833, he continued in that way.

Cross-examined. When complainant had the fit, witness was at work on the top of the wagon house. Can't state the day positively when complainant had that hard fit. Thinks complainant might have been walking about out doors the second day after he had the fit. Can't remember how long before he had the next fit. Can't say positively whether the fit spoken of was in the last of June or first of July.

In chief. Is satisfied that complainant had that hard fit either the last of June or first of July.

Israel Hackett, for complainant. Is 46 years old; has been acquainted with complainant 20 or 25 years; was at work at complainant's, with Jos. Hackney, in June and July, 1833, at the carpenter's business. Recollects that the complainant had a very severe fit the last of June or first of July, 1833. For a day or two after that fit, witness did not consider complainant competent to do any business whatever, at any time during the day. For several days after I do not recollect whether the complainant was capable of doing any business. Witness thinks after that fit, some parts of days, complainant appeared to be right, and some parts of days he appeared to be not right. By not right, I mean that he was not in his proper senses. He continued some time in that way of not being in his proper senses after the fit he had the last of June or first of July; cannot tell how long.

Cross-examined. Can't recollect positively the day on which complainant had that fit.

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Hugh Lippincott, for complainant. Is about 60 years old ; has been acquainted with complainant and defendant very intimately for 23 years ; has worked at the carpenter's trade, mill-wrighting, &c.; has lived at Absecom about 23 years. Complainant and defendant were in partnership when he went there, and witness thought they continued so, till he heard differently, quite lately. Witness sold them hay, and timber for building vessels. Recollects complainant's being sick during the spring and summer of 1833. Witness sat up with him. During that spring and summer complainant did not know what he was at. The night I sat up with him he was dreadfully out of his mind ; he appeared to be all over the world. Witness was at work at complainant's in July, 1833. The 29th of July, 1833, he charged complainant and defendant, on his book, with work done for them on the barn at complainant's down by the saw-mill, about half way between the house of complainant and the house of defendant. Witness frequently saw complainant before the 29th of July ; not a week but what he saw him. Before that day witness built there a cider mill during that year ; it might have been before ; it was built in the fall. Witness did not think complainant had his proper reason then ; witness wanted good hard wood to build the cider mill, such as white oak, as he told complainant ; and complainant went and got an old pine log. Witness told him it would not do. It was of no use ; he would have his own way. Witness went to work and finished the mill out of the pine log. They hitched a horse to it and went to grinding apples, and before witness could get his tools packed they tore out one or two teeth ; witness repaired it with harder wood, and after he had gone they tore out more teeth and tore it all to pieces ; and no man in his senses would have had a mill built of such wood. It cost \$12 or \$15, and was not worth \$1 when first done. Thinks he built this mill the fall before July, 1833. After that time witness cannot say whether complainant was capable of doing business or not up to July, 1833. He was always on the go, somewhere or other ; sometimes down shore and sometimes at Absecom ; but I don't know whether he did any business or not. During those rides down shore and at Absecom witness did not think complainant in his right mind ;

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his wife was always uneasy when complainant went away unless she or some of the family was with him. This was along before and after July, 1833. During his sickness in the spring and summer of 1833 he was up and down, out and about, and they could not keep him in the house. During this spring and summer he had a very wild look out of his eyes; he talked about very foolish things a good deal of the time in the conversations witness had with him. Witness did not know but what he had his proper senses when witness was at work at the barn he built for him in July, 1833. Recollects being at compl't's when def't and compl't were there when there was considerable paper and silver money on the floor. Witness went into the kitchen and inquired for one of them. He was told they were in the parlor. Witness opened the door and went in. Complainant was lying on the floor and defendant sitting on the floor. As witness opened the door complainant rolled over on his money to hide it. When he discovered who it was he rolled back again off of it. Witness thought no one in his senses would have acted in that way. He cannot ascertain whether this transaction took place before or after July, 1833. When defendant was Sheriff he was very seldom at home. Complainant went in one of the vessels when witness first went to Absecom, as captain, and was a very smart man. He continued until he was taken sick. Witness was on the beach when he came in sick. They came for witness to sit up with him. Can't say what year this was. He has never had charge of a vessel since; don't think he has been capable of taking charge of a vessel since.

Cross-examined. Don't recollect which of them settled with me for the building of the barn, but think complainant paid most of the bill. Witness expected they were in partnership at the time. He built a saw-mill for defendant five years ago; he contracted with defendant for building it; he expected they were in partnership at the time; defendant settled with him and paid him off. The next work he did after framing the barn at complainant's was framing a two-story house to go to the Peggy Leeds' place, for complainant. He considered this work for complainant

alone, and so charged in his book. Complainant told him he had purchased the Peggy Leeds' place himself, and it was his own property. Witness supposes there was no partnership about it. This was in the fall of 1833, after the barn was built.

In chief. When he commenced building the saw mill, five years ago, he supposed complainant and defendant were in partnership. Complainant was at the saw mill when it was raised, and superintended the raising. The defendant was not there.

Cross-examined. John Doughty was there at the raising. Defendant was on the road from Philadelphia, or at Philadelphia. Witness built the mill under the direction of the defendant; he furnished the principal part of the timber; he guesses the whole.

John L. Erwin, for complainant. Is 41 years old; knows the parties; has a recollection of complainant's being poorly and sickly in 1832 and '33; worked for complainant during that period. During the spring and summer of 1833 he considered the complainant not competent to do business. Can't say that complainant did even any little business during that period. During that period, when witness wanted money, he always went to complainant's wife for it. He did so because he considered complainant incompetent to do business. Recollects hearing the family say that complainant had violent spasms. Recollects the Doctor's coming there frequently during the years 1832 and '33. During the spring and summer of 1833, complainant was up and down, out and about. When asked he would give no directions about his work, but told witness to do as he thought best. He did not seem to know how he wished his work done; did not seem to say much about it; did not seem to take any interest in his business at all. Witness speaks of the years 1832 and '33. Complainant used to be wandering about the place, but did not go from home much. His wife appeared to be very anxious about him when he did get away. During that time he appeared to be stupid. Some part of the time during these two years he appeared to be very sleepy; at other times he appeared

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to be very wild, and could not get to sleep. During the spring and summer of 1833, witness considered him wholly incompetent to take care of his person or property.

Cross-examined. He worked at carpenter work for complainant, off and on, during the years 1831, '32 and '33. He boarded at complainant's.

In chief. Witness went by water with the complainant long before 1831. Complainant never settled with him during the years 1832 and '33. Witness did not consider him competent to settle accounts during that period.

Absalom Cordery, for complainant. Is about 52 years old; has been acquainted with the parties 30 years; recollects complainant's having a spell of sickness in 1828 or '29. He was sick some few years after that; can't tell the year. Witness went up several times and sat up with him; it might have been in 1832 or '33, but he has nothing to fasten it on his recollection. In this spell of sickness last spoken of, he appeared to be very much deranged and out of his mind. Witness recollects sitting up with him on that occasion when he had difficulty in keeping him in the house; recollects his endeavoring to get out, thinking his vessel was ashore. We had to quiet his mind and endeavor to get him off from it. He had no vessel on shore at the time. In some of his moves towards going to get his vessel off, he got his shoes, which were new, and said they wanted mending, and got his ends and awls and sewed them about in places. We suffered him to do it in order to take up his time, in preference to his going out; and we would have to watch him. After he was sick he was debilitated; his health was poorly for some time; but there is no act that occurs to witness' mind as to the state of complainant's mind after that time. In 1828 he was very sick. In his last illness he was more deranged than sick.

Cross-examined. Can't recollect the year when complainant had the deranged spell of sickness. The last spell of sickness he was not confined to his bed all the time.

Mrs. Alice Clark, for complainant. Is 47 years old; has been acquainted with the parties 25 or 30 years. Has a recollection of being at complainant's in the beginning of July, 1833; saw complainant then; he looked emaciated; witness spoke to him; his manner and deportment seemed simple. Thinks defendant was with him; thought there was some confusion in the family at the time; thinks complainant went off with defendant. The carriage was waiting; saw no such preparation as that complainant's wife was going away at that time; don't recollect seeing defendant's wife there that day.

Cross-examined. This visit was on the 1st, 2d, 3d or 4th of July. Her husband was with her. We took tea at complainant's; did not see defendant's wife there.

Mrs. Susannah T. Smith, for complainant. Is 35 years old; is a sister of complainant's and defendant's wife; recollects being at complainant's in company with last witness in 1833; saw complainant there; he and defendant were coming out of the door as we went in; saw there was confusion, but did not know what was the matter; saw no preparation as though complainant's wife was going away; don't remember seeing defendant's wife there that day; thinks she is confident she was not there when they got there.

Cross-examined. Thinks defendant's wife came there after she had been there some time.

In chief. Thinks she has a slight recollection of defendant's wife coming over just before tea. Thinks, if she came, it was about two hours after complainant and defendant had started.

Jonathan Pitney, for complainant. Is 45 years old; is acquainted with the parties, and has been for 20 years. Is a physician; has been complainant's physician from 1828 to this time. He attended him in a severe spell of billious fever in 1828. He was sick afterwards; it was the chronic disease of the liver. Visited him occasionally, but not frequently: on

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referring to his books he finds it so. He can state but very little from his own recollection. During the disease of the liver the complainant appeared absent. Can't say that this disease was in 1832-3. It was since the sickness in 1828. Daniel Lake died June 4, 1843.

Cross-examined. Complainant was delirious during the fever in 1828 ; he had a long time of sickness. In that attack witness attended him constantly, sometimes twice a day. At times during that sickness it was difficult to keep him in the house ; he was desirous to get up and go out and wander. In cases of billious fever the patient is apt to become delirious ; generally, reason returns after the fever is over. Thinks that during the sickness of 1828 persons had constantly to set up with complainant. If there had been anything remarkable in his last sickness, thinks he should have recollected it. Did not see him frequently during his last sickness. He appeared to go about part of the time ; sometimes he would come down to witness' for medicines ; at other times, when he got worse, witness would go up there. These facts witness states from his books and not from recollection. Recollects going to see him during his last sickness.

In chief. It strikes him he has been sent for to see complainant when he had fits ; but when it was he don't recollect ; nor did he ever see him have a fit as he can recollect. Heard persons about complainant say he had fits ; but never saw him have one. The disease of the liver did not confine him to his bed, only at times. Can't recollect that when he was confined to his bed by the disease of the liver he had a fever ; but most likely he had. The patient is not very apt to become delirious under that fever. At the time he was laboring under this disease he did not appear to be the same smart, active, business man he had been before ; should not suppose he was. Recollects going there one day and finding complainant lying on his back on the floor, with his knees up and his arms round his knees. Thinks it was in the last sickness.

Maria Tilton, for complainant. Is 33 years old ; the parties are her uncles ; she used to live in complainant's family ; went

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to live with him in July, 1832, and left in 1837. Complainant was, during 1832, and '33, in a poor state of health; he was quite sickly during 1833; he was confined to his bed during that year, at times. Recollects his having fits during that year; recollects his having one fit in May, she thinks, of that year. After that fit, thinks he went to Absecom with defendant and his son John, the same day he had the fit. Recollects his having other fits during that year. The fits seemed to get more severe as they increased in number. He had several fits during 1833; but don't recollect how many. Recollects his having one fit in July, 1833; thinks she does; thinks it was July, 1833. During the year 1833 complainant did not go much from home without some person with him. He was, during that year, at times dumb and stupid; at times wild and frantic. During that year, from the knowledge witness has of him, living in the house with him, she did not consider him during that year competent for the transaction of any business of importance. Witness does not recollect any business of importance which he transacted in 1833. She has heard complainant's wife tell defendant that he had taken the advantage of complainant by getting him to execute a deed to defendant for his property when he was incompetent for the transaction of business. This was during the summer and fall of 1833. Defendant made very little or no reply that she recollects of. Has heard John H. Doughty say, in 1832, that the defendant would not suffer the complainant to go by water any more. Heard John H. Doughty say, at the same time, that the complainant was not fit to do any business.

Witness was not at home, at complainant's, in the first part of July, 1833; she thinks she got home the 8th of July, 1833; has heard complainant's wife tell defendant that unless he would give up the deed complainant had given him, or make them some satisfaction, complainant would institute a suit against him; don't recollect any reply defendant made. Has heard her tell him this frequently during the time witness lived at complainant's. After July, 1833, as long as defendant visited complainant's while witness lived there, complainant complained to defendant about taking away his property. Has heard complainant call on defendant to give him up the deed, frequently, while witness

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lived at complainant's ; can't recollect how often ; but more than once. They used to disagree so much about the property that witness used to leave the room frequently when they were disputing. These disputes were after the deeds were executed.

Cross-examined. When she lived at complainant's he was a man of intemperate habits ; drank hard. The severe fit complainant had, that I spoke of, happened just after I returned home in July, 1833, as near as I can recollect. Doctor Pitney attended him in that fit, I think ; I think he was quite unwell for two or three days, so as to be confined to the house. Do not know of complainant's doing any business in 1832 or '33. When complainant had those severe fits after May, 1833, Doctor Pitney was sent for generally. Don't recollect of his being there in the fit in May, 1833. Sometimes when we would see the symptoms of these spasms coming on him, his wife gave him medicine the Doctor had left for him, without sending for the Doctor. I did not see him have all the hard spasms ; I saw him have a good many. Thinks that in the fall of 1833 complainant got better. Witness lived with her aunt, the complainant's wife, as a hired girl.

TESTIMONY FOR DEFENDANT.

Jonas M. Smith, for defendant. Is 44 years old ; has been acquainted with the parties 15 or 20 years. He bought of complainant and defendant, in July, 1833, one-sixth of the schooner *Uriah*, and sailed her until Feb'y, 1835. During the spring and summer of 1833, complainant and defendant sent out bills for different articles, which I brought them. For the most part he settled every trip. Don't recollect of ever settling with complainant. During the spring and summer of 1833, complainant sent bills by witness for goods. Considered complainant, during that spring and summer, capable of transacting business. In witness' opinion, in all the business he transacted with complainant during that spring and summer, he considered him competent to perform it.

Cross-examined. Has no bills at present with him in his pos-

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session to freshen his recollection whether he bought any goods for complainant in the spring or summer of 1833; but feels satisfied in his own mind that he did buy goods for complainant during that time. Has no recollection of purchasing goods for complainant during June and July, 1833; but is satisfied that he did during the year 1833. Has no recollection of complainant's sending any bills for goods during those months; but he did during that year. From Feb. 1833 to Feb. 1835, has no recollection of settling any of the freights with the complainant. He bought goods for Nathaniel during 1833; but will not confine himself to any particular month during that year. Thinks bills were sent by complainant during that year. He overhauled some of his vessel bills yesterday, but was in a good deal of a hurry. Has no recollection of seeing any, in overhauling yesterday, of complainant's, dated in 1833.

John P. Cramer, for defendant. Is 44 years old; has been acquainted with the parties 16 or 17 years. About the 1st of April, 1833, he commenced working for Wm. Pine in making coal on land of the parties, and worked as late as November. He called on complainant to move him from Wrangleborough to the coaling. Complainant agreed to send his team, and in the morning John Colyer came with the team. During the time he worked at the coaling he was in the habit of seeing complainant constantly; sometimes oftener than others. During the time I worked at the coaling I considered complainant a man capable of transacting business; never heard or saw anything to the contrary until lately. Recollects calling at complainant's the night of the 2d of July, 1833, for his horses and wagon to go for a woman to attend witness' sick wife. They had gone to bed, I think. Think complainant got up and called John Colyer; Colyer got up and helped witness gear the horses.

Recollects being at complainant's after that, when he had a lot of clover to mow; is pretty near positive it was after that time. Complainant called in several persons to try the scythe. Thought complainant appeared perfectly rational and sensible and capable of doing business at that time.

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Cross-examined. The nearest of the coaling was a quarter of a mile, and the farthest a mile and a half from complainant's residence. Was not in the habit of seeing complainant frequently previous to 1833 ; perhaps once or twice a year. Witness was at the mill sometimes once a week, sometimes twice, and sometimes not at all during the week, while working at the coaling ; but when he was at the mill he generally saw complainant there or about home. Don't know of complainant's having any fits that year. Never heard anything about his having any fits that year, till a short time ago. During that time he was not very often in complainant's house ; was there, he expects, two or three times. Complainant was in the kitchen part of the house, the night of the 2d of July, 1833, when witness went to the door. He called Colyer and went to bed again, witness supposes. Don't recollect having seen complainant that day before. Don't know that he has, particularly, any recollection of having seen complainant on the 4th of July, 1833.

In 1836 he coaled for complainant on the south side of the south branch of Absecom, above complainant's house. Don't know what tract that was on. It was, the nearest, half a mile, probably a mile, from complainant's house, and extended a good deal further. Is positive defendant never forbid his coaling for complainant in that place in 1836.

Mrs. Abigail H. Blackman, for defendant. Is 25 years old, and a daughter of defendant. Recollects complainant's coming to defendant's house in the forenoon of July 4, 1833. He went into the other room with father and brother John ; staid there a while, and then came out and went home. At noon father sent me with the deeds to complainant's. Witness took the papers defendant gave, and he told her to give them to complainant, and for him to read them. Witness took the papers and gave them to complainant. He was wiping himself at the towel ; witness told him what her father told her to tell him ; complainant told her to lay them down on the table and after dinner they would read them. It was washing day in our family that day. My mother had intended to have gone down shore that day. Mother went over to complainant's in the afternoon

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of that day ; In the morning when witness saw complainant at her father's, and when she took the papers to him, he appeared to be in his right mind and perfectly rational. The day after the 4th of July, 1833, complainant came to father's house, with his wife, and took my mother to see Mrs. Cramer and her young child.

Mr. Lake asked complainant's wife first to sign the deeds ; she did not sign them, but said she would rather look over them. She asked Mr. Lake if she could sign them at any time ; he said she could, and then turned to my mother—"thee not rather, if Sally (complainant's wife) don't choose to." This was the day after the 4th of July, 1833.

The families of my father and uncle were on terms of closest intimacy, and continued so till I left my father's house, on my marriage, in 1841. Witness was in the habit of visiting complainant's house several times a day, and lived there at times. Never heard or knew while she visited or lived there that complainant was incapable of transacting business for himself ; has seen him doing business in his own house in 1833. Never heard complainant's wife complain of the dissolution of the partnership.

Cross-examined. She was in her 13th year on the 4th of July, 1833. She did not read the papers her father sent her with ; knows they were deeds by her father's telling her so. Never saw complainant have a fit during 1833, but has heard of his having them.

Charles C. Murphy, for defendant. Is in his 30th year ; the parties are his uncles ; he went to live with complainant in May or June, 1832, and lived there till Feb. 1834. Exhibits D, E and F. Complainant's conduct and actions at the time of the execution of the papers E and F was about the same as they had been previous to that time, some time before and some time afterwards. Exhibits G and H.

Cross-examined. Has no recollection of Exhibit D being read in his presence when he subscribed it as a witness. Don't know

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whether it was executed on the day it bears date or not. The whole of the body of the instrument is in John H. D.'s writing. Recollects that the complainant, during the years 1832 and '33, was not what a man ought to be. Recollects hearing that he had fits during that year. Never saw him have a fit; has seen him soon after he had one; once, in particular, during the year 1833. During that summer he laid about; sometimes under the tree, and sometimes on a bench under the tree. Thinks that during that summer he did in some measure neglect his business. Has no recollection of the day or the month when Exhibits E and F were executed. The actions and conduct of complainant at the time of executing these papers, and some time before and some time afterwards was such that witness would not have been willing for him to have transacted such business for witness; though he might have been capable of transacting such business. Don't recollect seeing the interlineation of the words "except where the sawyer's house stands," in Exhibit F at the time of its execution; thinks these words are in defendant's writing. Recollects complainant's being at a camp meeting, at Catawba, in Aug. 1833; his wife was with us, and the defendant's wife. Believes complainant had a fit on the camp ground that day. Saw him soon after, and was satisfied from his appearance that he had had one of those fits. Recollects hearing that complainant had conveyed away his property to defendant, and complainant's wife was dissatisfied about it; but whether it was the deed of conveyance or the articles of dissolution he can't say; may be both. Exhibits G and H are all in defendant's handwriting, except complainant's signature.

In chief. The reason why I considered complainant, during the years 1832 and '33, was not what a man ought to be, was because I thought he drank too much liquor. The reason why I would not have been willing for him to have transacted business for me was pretty much for the same reason; that I considered he drank too much.

Cross-examined. Complainant drank very hard during 1832 and '33, I thought. During 1833, when he drank so much li-

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quor, I should not have been willing to have had him do business of importance for me. Would not have been willing to have trusted him to transact business of importance for me during 1833, no how.

In chief. The main reason was because he drank too much, and another reason he had those fits or spasms. I considered these fits or spasms to have been brought on by his drinking too much.

Hezekiah Steelman, for defendant. Is 42 years old ; has been acquainted with parties several years. He acted as sawyer at the mill from March, 1831, to Nov. 1833. Some time before I left the mill, the business as with complainant and defendant was separated, and I worked and sawed for each of them separately. After the separation, defendant's logs were brought to the mill as they were before ; but the complainant's were marked with a charcoal mark so as to distinguish them. Complainant, after the separation, would sometimes come to the mill, take charge of his lumber, and give directions as to how he wished it sawed. Before the separation, sometimes complainant and sometimes defendant would give directions as to the sawing of the lumber. During the time I sawed for complainant and defendant and for complainant himself, I considered complainant sometimes capable of transacting business, and at other times not capable. Should suppose that when complainant came to the mill he was oftener not capable of transacting business than capable. The reason why I thought he was sometimes not capable when he came to the mill was because I thought he had drank too much liquor. Sometimes, when he came to the mill, I considered him as capable of transacting business as when I first knew him in 1831 ; but he hardly ever came to the mill but what I supposed he had been drinking some liquor.

Cross-examined. Saw complainant have one fit while I was at the mill ; he got upon the hill and was taken with it. Was at complainant's house afterwards ; came there while he had another fit on him ; can't tell the year ; it was while I

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lived at the mill. Sometimes from Jan. 1, to Nov. 20, 1833, I would have been willing that complainant should have transacted business of importance for me. He was very frequently during that period incapable of transacting business; on account of his drinking too much was the reason I considered him incompetent for the transaction of business. Part of the time I coaled for complainant in 1833 and '34, was on a tract above a little spring called Tarkiln. Defendant never forbid me coaling there for complainant.

Reading Imlay, for defendant. Is 36 years old; has been acquainted with the parties 12 or 14 years; contracted with complainant for finishing a house for him in Nov. 1833, on the Peggy Leeds place; considered him then competent to transact business.

Cross-examined. During November and December, 1833, complainant drank very hard; while in liquor would not have trusted him to do business of importance for me. When not under the influence of liquor, he would have trusted him to do such business.

Uriah Adams, for defendant. Is, he believes, as much as 45 years old; has been acquainted with the parties 20 years; was employed for them in 1831, in screwing up a vessel on shore; complainant was the main man then in superintending and directing the work; he was at times while there very much in liquor, as far as I could judge; he would often go and lay down when under the influence of liquor.

I considered complainant, from the time of screwing up the vessel, in 1831, to the time of my selling him my property, in 1839, a man capable of transacting business for himself. During all that time, in all the business I had with him, and as far as I knew him, I could see no difference with him as to transacting his business, except when he was in liquor and when I saw him sick, in 1828. He was at that time very sick, and they did not expect him to live. From 1831 to 1839, I did a great deal of

business for and with complainant, and saw him frequently when I was at home.

Cross-examined. Has no recollection of signing Exhibit I on the day it bears date, further than appears from the date of the paper itself. He don't recollect any business he had with complainant from April, 1833, up to January, 1834. He is now at work for defendant, building a vessel for him.

In chief. Is perfectly satisfied that Exhibit I was signed by him on the day it bears date.

Jonathan Pitney, called for defendant. His examination was objected to ; but an order had been obtained by the defendant for his re-examination.

He finds by referring to his books that complainant had a very severe spell of sickness in 1828. The first charge in 1833 is May 24. He gives the different charges on his book, running through May, June, July, August, September and November, 1833. Is satisfied that complainant's chronic disease of the liver commenced in 1832 ; that is, he commenced treating him for it that year. I state this from using a particular medicine that relieved him that I had never used before for that disease. The medicine I gave him for that disease and the disease together did not wholly incapacitate him for business. While he had this disease and was taking medicine he was in the habit of drinking spirituous liquor ; but not by my advice. He had pains in the bones of his legs, knees, back and sides. I called the pains the rum gout. During all the time I have known complainant he has been in the habit of using spirituous liquor in some shape or other. When not under the influence of liquor he is a sensible man, and as capable of transacting business as ordinary men. Presumes that complainant sometimes called for the medicines himself at my house, at the times charged in my books. Can't recollect seeing complainant in the months of June or July, 1833, when he was of unsound mind or crazy. In 1828 his sickness, while it lasted, caused delirium. He don't recollect ever seeing him have a fit. My impression now is that the fits they said he had were caused by excessive drinking.

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Cross-examined. I rather think, judging from the medicine I gave complainant, that I treated him for the chronic disease of the liver in 1833. I see by my books that on the 6th of June, 1832, I gave him a remedy that I had given him before for that disease and pains in his bones spoken of in his examination in chief, and is the same medicine I gave him in 1833 for that disease and the pains, and which relieved him, and which I never used before for that disease that I can recollect of. The charge on my book on the 15th of July, for visit and medicine, it does not appear what the medicine was; and the charge on the 16th is the same way.

I have said in my examination in chief, that the chronic disease of the liver and the medicine I gave him did not wholly incapacitate him for business; but disease, medicine and liquor, when he drank too much, made him incompetent for the transaction of business. I think while he had this disease and was taking this medicine he drank more or less liquor every day; such is my impression. I might have seen him in the months of June and July, 1833, when he might have been incompetent for the transaction of business, and I have no recollection as to the months; and he might have been so during those months and I not have seen him. I have no personal recollection as it regards time.

In chief. I did not conceive that the medicine I gave him for the disease of the liver and his pains, in 1832 and '33, made him incompetent for the transaction of business; but it was the liquor, combined with the disease and medicine, that rendered him incompetent for the transaction of business. If he had have been of unsound mind or crazy for any length of time continuously, I should have recollected the fact.

Dr. Mahlon Canfield, for the defendant. Is 48 years old; is acquainted with the parties; lived in Atlantic county 14 years; was Collector there; always knew the parties while he lived there; lives now in Morris county. Exhibits K, L and M on the part of the defendant being shown to him, he says he is the subscribing witness to each of them; and Exhibit N being shown

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to him, he says he is one of the subscribing witnesses to it. He has not the slightest recollection of the transaction : he only speaks from seeing his signature to the papers.

Cross-examined. The bill of sale marked K is filled up in the hand-writing of his wife. The filling up of Exhibits L and M is partly in the handwriting of his wife and partly in his writing. He was at the house of the complainant a good many times while he lived in Atlantic county. He went there in 1825. Complainant appeared to carry on and conduct the partnership business while defendant was Sheriff. Complainant was an active business man at that time ; very much so. Remembers complainant's having a severe turn of sickness ; thinks it was in the fall of 1828. Did not consider complainant the same shrewd business man after that sickness that he was before. From the time of his sickness and for several years after, my impression is clear that he was not a man fit to do any important business. I would not have felt satisfied in making a deal with him ; if he offered to trade horses or carriages, or anything of the sort, I would not have dealt with him. The time of the execution of the papers, K, L, M and N, would have come within the time when I considered the complainant incompetent to do business, although I have no recollection of anything that took place at the time of the execution of the papers. He was a practicing physician when he resided in Atlantic. Exhibit A on the part of complainant, and Exhibit N on the part of the defendant, are in the handwriting of John H. Doughty.

In chief. When he first went into Atlantic he went into partnership with Doctor Pitney. We lived in the same house while we were partners, about two miles from the complainant's. Quit partnership with Doctor Pitney, and removed to Bargaintown, in 1827, about seven miles from the complainant's. Did not attend complainant regularly in his sickness in 1828. Doctor Pitney was his physician. I saw him once during that sickness. His disease was bilious fever. For six or seven years after complainant's sickness in 1828, I considered him incompetent to do business.

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Cross-examined. Met complainant after his sickness in 1828 much more frequently than I went to his house.

In chief. My meetings with him were altogether casual. I was always in the habit of talking with him when I met him. He was in the habit of using spirituous liquors freely; it was a daily practice with him to drink. He was frequently under the influence of liquor, but I never saw him down.

John H. Doughty, for defendant. Is the son of defendant; was born Nov. 1, 1816; thinks he heard the parties talk about dissolving partnership three or four times before they did so; heard them talk about it as they were riding in the wagon from home to Absecom or from Absecom home. Think I heard them talk about dissolving in 1831; think it was in the spring of that year. The first I heard of this conversation was at the complainant's place, in the door yard. Don't remember who commenced the conversation; thinks he came up while they were talking about it. After I came up they had some conversation about dividing the horses and as to the manner of dividing them. I think it is likely I left them before they finished the conversation.

I heard them talk about dissolving in 1833, just before they did dissolve. I don't know which party first proposed the dissolution; they talked about it before they came to terms.

One morning my uncle came over to my fathers; this was the morning of July 2, 1833; my uncle said to my father: "Enoch, I am tired of doing business this way, and let us dissolve." Father replied, "What way do you want to dissolve?" My uncle said, as near as I can recollect, "You take and make me and my wife a deed for your part of the 100 acres where I live, and your part of the Peggy Leeds place, and let me keep my half of the salt meadow, my half of the twenty acres, and my part of Zack's meadows, and I will make you a deed for all the rest." Father then said to him, as near as I can recollect, "When shall we get the papers drawn?" My uncle said to him, "Have it done right away." I think father asked him who he would have to draw them. I think my uncle replied, "You can set John to

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draw them." As near as I can recollect, they then talked over about the teams and other property, debts and the like. They agreed that they should draw the articles of agreement for the balance of the property. I drew the deeds between them; I mean the deed from my father to my uncle and his wife, and from my uncle to my father. Exhibit N on the part of the defendant, and Exhibit A on the part of the complainant, are the two deeds I have just spoken of. The body of both deeds are in my writing. I had before me a large bundle of deeds and title papers when I drew these deeds. Part of them my father gave me, and part of them my uncle brought over from his house and laid them down on the table. The deeds my uncle brought over were, as I understood, a part of the chain of title papers. I begun the deeds on the 2d day of July, and finished them on the morning of the 4th of July. They were signed on the afternoon of the 4th of July. They were signed at the house of Doctor M. D. Canfield, in Bargaintown. They went there to make some bills of sale of vessels which they had held in partnership. Exhibit K, L and M, on the part of the defendant, being shown to him, he says he believes them to be the same bills of sale which were executed that day. The deeds were taken along to be executed at the same time. He drove up by Daniel Lake's from Doctor Canfield's, and the deeds were acknowledged before Daniel Lake. The body of Exhibit E on the part of defendant is in his writing. The signatures to it are the signatures of my father and uncle; it was executed by them in my presence; I recollect its being signed by them. The body of Exhibit F. on the part of defendant is chiefly in his handwriting; some little of it is not. It is all in his handwriting except a little that my father wrote and a little that my uncle wrote. The part my father wrote is interlined between the 5th and 6th lines from the top; the words are, "except where the sawyer's house stands." The part my uncle wrote consists of four lines near the bottom, commencing with the words "blocks and rigging," and ending with the words "also at home." My uncle also wrote the words "signed, sealed and delivered in the presence of." I commenced drawing these papers E. and F. in the afternoon of July 5th, and finished them in the morning of July 6. I did not frame the instruments myself, but copied them

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from a draft that was furnished me. My uncle furnished me with the draft ; to the best of my recollection it was in his writing. As near as I can recollect, I just copied after the draft he gave me. These two papers, E. and F., were signed at my uncle's house, on the porch on the north side of the house ; Chas. Murphy was there and signed them as a witness. I think these papers were examined by my uncle before they were executed. There were duplicates of the papers E. and F., executed that day, and each party took one. Before the papers were signed I read one of each kind aloud so that they all could hear, and my uncle looked over the others while I was reading, and saw they were right. Uncle's wife was present during all this time. I don't recollect of her objecting to anything. After the papers were read over, my uncle's wife said to my uncle, "You might as well have the old sorrel horse in, for he is old and worn out, and Enoch (the defendant) would work him to death," or something like that. Father agreed to it, and I then put in Exhibit E. the words "and the old sorrel horse." I think the papers had been all left unfinished so that anything might be added. I mean that I left off the attesting part at the foot of the instruments. They were all finished before they were signed and sealed by the parties. The papers which were executed by my father and uncle, and taken by my uncle, were duplicates of E. and F. to the best of my recollection. I think the part of F. which I have described as being written by my father and my uncle was written that day, at my uncle's house, before the papers were executed. Before father and I went home that afternoon, we went to uncle's barn and removed over home the teams which had been set over as my father's share ; my uncle knew we took them. I think he saw us do it. He was down at the barn, but whether he assisted us I do not recollect. They kept a small store. There was a little coffee and sugar divided between my father and my uncle. The store was kept near uncle's house. I went over some time the next week ; think my mother sent me. Some sugar and coffee were given to me. I told them I wanted father's share of the groceries, and these were given to me ; I took them home. My uncle is a capable business man—so considered generally. He has been so considered since I knew him.

To a question put by defendant's counsel, whether complainant was entirely competent to do business when he executed the deed, he says he was. To the question: was the complainant in full possession of his mental faculties when he executed Exhibits E. and F.? he says he thinks he was; he has no doubt of it. To the question: From your uncle's condition and conversation on the 2d, 3d, 4th, 5th and 6th of July, 1833, have you any doubt of his being in the full possession of his reason and mental faculties and capable of transacting the business which he did then transact? he answers, I have no doubt about it; I think he was fully capable of transacting the business which he then did. I don't know of his being deranged or in any way out of his mind during the months of June and July, 1833. In making the dissolution of the partnership, and in executing the instruments and papers which were then executed, he appeared to understand fully the nature of the business he was doing. A part of the property conveyed to the complainant was called the 100 acre tract; another part was called the Peggy Leeds place. Complainant lived on what was called the 100 acres. Since the dissolution of the partnership, complainant has used separately the property set off to him as his own separate property. He took and used the personal property set off to him also as his own. Since the dissolution my father has always had the separate use and control of his own share of the property. Uncle, right away after the division, tore down the barn on his part of the property or belonging to his part and re-built it right away, the same season. The barn that was taken down I have understood was not on the 100 acre tract, but it was always used with the house. He moved it across the road upon what I understood was the 100 acre tract, and put it up again, part of the old timber and part new timber. I think they tore the barn down the next week after the articles of dissolution were executed. It was put up again on the 100 acre tract; within two weeks, or three at farthest, the barn was raised again. I suppose this was done under the direction of my uncle; he attended to it. Complainant has since built a house on the Peggy Leeds place; the house was commenced in August or September, 1833, and was raised that fall. I have understood that my uncle has sold part of the

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Peggy Leeds place, to one Gilbert Miller. I have been on the property described in Exhibit O. It is a part of the Peggy Leeds place, as I always understood it. I never saw the Peggy Leeds place run. Miller has built a house on it since he bought it. Part of the Peggy Leeds place was woodland at the time of the dissolution; I understood complainant had it cut off. The wood was sold or disposed of by him; a part of it was burnt into charcoal. He sold me about twenty cords of that wood. This was after 1840, and before 1844. I asked my uncle about this wood, and he said I could have it. I gave uncle credit for it in my books. I gave him credit for the number of cords, I think. I then kept a store, and uncle had dealings with me and he had an open account. Father and I went into business together in May, 1840, in store keeping. Uncle has not dealt with the firm since 1844. Uncle frequently paid his workman by his individual orders on the store; Exhibits P., Q., R. and S. are four of those orders. I suppose I have at home 100 orders of the same kind. Since the dissolution uncle has always occupied the cleared land south of the mill as mentioned in Exhibit F. He has occupied the sawyer's house and the land it stands on, part of the time, since the dissolution. He once showed me the line of the 100 acre tract, and told me that one of the lines took in the sawyer's house. He claimed the sawyer's house as his, and I don't recollect that my father has ever occupied it since. Since the dissolution my uncle has always used and claimed the cutting privilege on the property described in Exhibit F. Since the dissolution my father has always carried on business by himself, except his partnership business with me. He has, ever since, held and enjoyed the property set apart to him as his own separate property.

He speaks of conversations between his uncle and father, in 1831 and '32, about their law suits with others, respecting the boundaries and title of tracts set off to his father when they dissolved. Part, if not all those suits, were pending at the time of the dissolution.

Father made various improvements on the land set apart to him. He removed the old dwelling-house, and built a new one. This he commenced, I think, in the fall of 1834. He has built

two other small houses on the part set apart to him, on what is called the mill tract ; one, I think, in 1844 or '45, and the other last year. One was built before this suit was commenced ; but I don't recollect positive about the other. My father also built a third house on a part of the property he got at the time of the dissolution, called the Brown place. This was built two or three years ago. ' Ever since the dissolution father has used and occupied, separately and by himself, the mill. The re-building of the mill was commenced in 1841, and finished early in 1842. I assisted in raising the mill ; father was then at home. Uncle took no part in superintending or directing ; he had nothing to say. Uncle lived at home while the building the houses and mill was going on, and could see what was going on every day.

After the dissolution my uncle sometimes brought logs to the saw-mill to be sawed. I have known logs to be brought there by other people ; but it is a very rare thing. Uncle's logs were always marked in a particular way, so that they might be known. Sometimes they were marked when they came to the mill, and sometimes after they got to the mill. After the dissolution, my uncle's lumber, when sawed, was always kept by itself, to the best of my recollection. That was not the practice before the dissolution. I have seen my uncle's team-drivers mark his logs sometimes ; they were generally marked by his workmen ; I never saw anybody else mark them.

On the next Monday after the articles dissolving the partnership, E. and F. were signed and executed by the parties. I remember returning from Absecom with my father, in a wagon, and as we passed uncle's door, I recollect uncle's asking my father if he could let him have some money to pay his harvest men with ; I think he asked for \$2 or \$3. I think my father said he had not it with him ; but when he went home he sent me back with the \$3, after dinner. I handed it to uncle just as father handed it to me. Uncle's people harvested the next day. I was over there in the afternoon while they were at work. My uncle was in the field in the afternoon, and I think he helped carry some of the rye together, or helped shock it. After the harvesting was done, I think the next week, I heard that my uncle had a fit. According to the best of my recollection, it was in

the forepart of the week that I heard this. After I heard it, I went over to uncle's, the same day. They called it a rum fit. I understood it was the same kind of one he had before, and that I saw him have. The one I saw him have threw him down, prostrated his whole system and twitched his limbs. I saw him have the fit in May, 1833. He then recovered in about half an hour. It came on him, at that time, while we were hitching the horses to go to Absecom. After he recovered he went to Absecom, the same afternoon. I remember uncle's being sick in the fall of 1828. The Doctor said he had the bilious fever. That fit of sickness, as near as I can recollect, began in August, and he was out again the last of October of that year.

Exhibit Z. on the part of defendant is in his handwriting. The signature of complainant to it is in his writing. He has no recollection of the time it was executed. He supposes it was on the day it bears date, or about that time.

Thinks uncle was over at father's several times while I was drawing the deeds. I recollect he was over there one day, and asked father if the deeds were done.

Cross-examined. The first time I heard uncle and father talk about dissolving was in 1831. Don't recollect any other person being present but myself. I don't recollect hearing them talk about it again until they did divide, in 1833; think in the latter part of June, 1833. No one else was present but myself. The next time I heard them talk about it was on the 2d of July, 1833. That was over on my father's side, on that place where my father lived. It was about 20 or 30 yards from father's house. There was no one else present but myself. I had no orders from the parties that morning to draw any bills of sale for any vessels. I think there was over 60 acres in the Peggy Leeds place. There was no house on it at that time; supposes there was about 20 acres of farm land on it, besides the banked meadow. I always heard the other place called the 100 acres. There was, I suppose, about 25 or 30 acres of farm land in that; the balance was pine timber—some oak interspersed, but called pine land. I began to draw the deeds on the 2d of July. I don't recollect that I consulted my father while drawing the deeds. I

think my father laid the deeds down before me and told me how to draw them, that is, the descriptive part of the deed; I mean the description of the property. Uncle brought a small bundle of deeds over there, and my father had some; but whether I drew my father's deed from the one or the other I cannot tell. I cannot name the deeds my uncle brought over; I understood they were title papers; I don't recollect whether I understood this from my father or my uncle. I remember my father's giving uncle some deeds that belonged to the 100 acres, and the Peggy Leeds deed, or the old deed for the Peggy Leeds place; and I think my father kept the others that related to the land that he had. My uncle brought the deeds over on the 3d of July, Wednesday. My uncle, after we separated that morning, went right over the dam towards home. Father and myself went over to uncle's, and we all three went to Absecom that forenoon. We generally drive our horses under the shed at the tavern at Absecom; don't recollect whether I went into the tavern or not; father and uncle, to the best of my recollection, went into the tavern. Don't know what their object was in going to Absecom. I went after paper to draw the deeds on. Think I commenced one of the deeds in the morning of the 2d of July. Think I had but one sheet of paper, and I quit till I got the paper I have spoken of, and I re-commenced that afternoon. Think I went on with the same deed I first commenced; that was the deed from uncle to my father. I did not go on with the same sheet of paper I had commenced with in the morning. I had made a mistake in it, and hove that away and commenced again. I had not got to any description. Father was in the room with me part of the time while I was writing that deed. The room was considered a parlor in those days. Father told me to copy the description of such and such property from the deeds he laid down. Think I got the deeds done about 10 or 11 A. M. of the 4th of July. I think I gave them to my father after I finished them. I next saw them again after dinner that day; uncle had one or both of them in his hands then, in his own house. Father was then at uncle's house. I was in the room where they were; I remember my uncle's wife being there. I think there were other persons there; think they were

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women and girls. It was about two or half-past two. I was 17 the November following. After the dissolution the principal articles of personal property which my father took possession of were 6 mules, a very poor lot of gear, four horses, three heavy wagons, one light wagon, one sulkey, some old harness with these horses, one set of ox-chains; that is about the principal that I recollect, excepting the vessels and vessel property. There was some lumber at the mill; there might have been 10 or 15,000 ft. Father did not get possession of the whole of that lumber; uncle got a good part a good part of it; think it likely he got half of it, likely not so much, likely more. There was considerable cord wood and coal wood cut, and uncle got a part of the cord wood. At a rough guess there was from 600 to 1,000 cords of coal wood cut. I don't know how much of the wood uncle got; he was to have 200 cords of cord wood in the division. I don't know how much he got; I saw him take some. Uncle kept the oxen, and father took the steers; there was one yoke of each. Father, uncle and I went away from uncle's together in about half an hour after father and I went over to uncle's on the 4th of July. We went to Doctor Canfield's. I did not see the deeds from the time we started from my uncle's till we got there. When we got there I think my uncle had one deed and my father the other. They laid them down on the table and said they might as well sign them there before the Doctor. They signed them there.

I don't recollect anything being said before I left uncle's house what we were going to Doctor Canfield's for. I don't know whether these deeds were examined by my uncle and my father, or either of them, while they were in the kitchen at uncle's. I heard father ask uncle if he had read them, and he said he had. I think I saw the deeds, one or both of them lying on the table at uncle's before we left for Doctor Canfield's on the 4th of July. On the dissolution of the partnership uncle took a pair of grey horses, a sorrel horse, a new farm wagon, gears for the horses, riding chair and harness. He retained one-third part of the schooner Uriah and all his stock of neat cattle and sheep. There were several head of cows and calves and a good many sheep.

My father did not get as many head of cattle as my uncle got, and he got no sheep. The sorrel horse was said to be old, and I suppose he was.

I saw uncle on the 5th of July. He had neither of the deeds then that I know of. He took one of them after they were signed at Doctor Canfield's, and father took the other. I saw uncle take one up and put it in his hat; and I saw him afterwards hand it to Daniel Lake. I never saw the deed in uncle's possession after he handed it to Daniel Lake. The division of the mules and wagons and such like was made on the 6th of July.

Uncle's wife gave me the coffee and sugar mentioned in my examination in chief. It was not weighed to me. Father's family were in the habit of going over to uncle's and getting groceries. The groceries and provisions of the firm were kept over there. When I went over there to get groceries for my father's family, it was the usual habit to hand them to me without weighing them. I saw my uncle on the 5th of July, the day after the execution of the deeds, at his own house. I think aunt and likely the whole family were present, but I don't recollect positively. I don't recollect anything about the deeds being mentioned; I mean the deeds executed the day before. My uncle, on the 5th of July, handed me a paper and told me to copy it. The contents of the paper which uncle gave me to copy are embodied in two papers which have been exhibited here. I don't know that I have ever seen the paper which he gave me to copy since the 6th of July, 1833. I have no recollection of what I did with it. It had no name to it when he gave it to me. I don't recollect whether it had a date to it or not. Being asked by the counsel for complainant whether he made a copy of that paper, he says he thinks he did. He copied the paper and made these two copies which are here. I don't recollect whether uncle gave me one or two papers to copy. To the best of my knowledge, I made the two copies marked E. and F. from the paper or papers my uncle handed me. I can't say positively whether my uncle handed me two papers or only one. I think they were exact copies of the paper or papers he handed me, nearly as I can recollect. My memory don't serve me what became of the papers he gave me. I think I carried the papers

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over to my uncle myself, after I had copied them; did so on Saturday the 6th of July, in the forenoon. I gave my uncle four papers on the morning of the 6th of July.

Being asked whether he means to say that the papers he then gave his uncle were exact copies of the paper or papers his uncle had given him the day before, he says two of the papers he gave him were like Exhibit F., and the other two like Exhibit E. So far as one of these Exhibits is in my writing, I think it is an exact copy of the paper he gave me, so far as I can recollect. The other Exhibit was written down to where the words "the old sorrel horse" are added; and I think those were copies also of the paper uncle gave me. The paper or papers he gave me to copy were in his own writing. Has no recollection of the original paper or papers and the copies being compared together. I don't recollect whether I had any conversation with my father about these papers or the copies previous to or while I was making the copies. These papers were executed on the afternoon of the 6th of July, in the porch on the north side of the house. I don't recollect that I have ever seen among my father's papers the original paper or papers which my uncle gave me to copy.

On the 4th of July, 1833, when we went from Doctor Canfield's to Mr. Lake's father and uncle went into the house with Mr. Lake; I did not go in; I stayed and minded the horses; father told me to do so.

There was, I think, 8 or 10 acres of meadow belonging to the Peggy Leeds place. There was 20 or 25 acres of farm land on the part my father lived on. I think uncle's house, at the time of the dissolution, take it on an average, was fully as good as father's.

J. C. Smallwood states the office of Sheriff to have yielded defendant \$7,000, subject to expenses and his charges as agent, &c.

Jeffers and *Browning*, for the complainant. They cited *Higmore on Lunacy*, 103; 2 *Green's Ch.* 357; 4 *Wash. C. C. Rep.* 583; *Shelford on Lunatics*, 2, 274, 276, 379, 280; 2 *P. W.* 270; *Fonbl. Eq.* 67, 8; 9 *Pet. Rep.* 416.

J. Wilson and *P. D. Vroom*, for the defendant. They cited 2 *Stark. Ev.* 932; 3 *Mass. Rep.* 330; 7 *Searg. & Rawle*, 92; 8 *Ib.* 573; 8 *Mass. Rep.* 371; 1 *Green's Ch.* 11, 87; 3 *Ib.* 305; 1 *Story's Eq. Jur.*, sec. 529, sec. 231; *Angell on Lim.* 9, 168; 9 *Pet. Rep.* 416; 3 *Bro. Ch.* 633, 647; 2 *Jac. & Walk.* 151; 3 *Ves. Jun.* 583; 17 *Ib.* 96; 2 *Stark. Ev.* 26.

THE CHANCELLOR. The answer in this case is a very labored production, containing a great deal of argument and a great amount of verbiage. But, it is not only a failure as an answer, by its omission to respond to several very essential matters; but a careful observer, who will take the labor of studying it, after having read carefully the testimony in the cause, cannot fail to see its illusory character, and the care which has been bestowed on its frame and language. It is apparent that the "*mens conscia sibi recti*" is not in it. The defect of the answer is, no doubt, chargeable to the person who furnished the draft of its statements to the solicitor.

First, as to its omissions: The bill, from its nature and charges, called on the defendant to state what the partnership property, or the property held in common between them, consisted of, as well real as personal property; including the debts due the partnership. The bill charges, that there were 1,000 cords of pine wood ready for market, on a landing; 1,600 cords of wood in the woods, ready to be made into charcoal; a quantity of sawed lumber at the mill, and 1,500 bushels of charcoal. All the answer says as to this is, that there was some wood, lumber and charcoal, but the precise quantity the defendant cannot state. So, as to the debts due the firm, he says there were debts due the firm, and that he has collected all of any importance, but that he is unable to state the amount thereof.

So, the bill charges that the complainant and defendant put in, as stock, an equal amount in the partnership. No answer is given to this. These are some of the omissions.

They are all very material matters. The amount of property and debts due the firm may enter very essentially into the question involved in the case; and the allegations, which seem to be given in lieu of answers to these matters, that the

complainant knew or ought to have known what was the property of the partnership, cannot be received as an answer.

It is true that the answer might have been excepted to for such omissions; but the not excepting does not cure the defect; and if a defendant will take the responsibility of putting in such an answer, he takes the risk of the influence of its defects on the decision of the cause.

But there are much graver matters for the consideration of the court, growing out of the nature of this answer. I shall first notice its statements in relation to the vessels. It says that, in further carrying out their said agreement for dissolution and division, the complainant, on the 4th of July, 1833, by bills of sale, conveyed to the defendant five-twelfths of the schooner *J. R. Rapelye*, one-third of the schooner *Sun*, and one-twelfth of the schooner *Uriah*. That the shares of the said vessels were estimated between him and the complainant, and the estimated value put into the bills of sale as the consideration thereof; (the considerations stated are, \$1,000 for the five-twelfths of the *Rapelye*; \$1,000 for the one-third of the *Sun*; and \$150 for the one-twelfth of the *Uriah*,) which the answer says, was either paid by the defendant to the complainant, or allowed and satisfied to him in the settlement and division of the partnership business and property. This is a remarkable answer. Did he pay the complainant the consideration stated in these bills of sale? If he did, he certainly knew it, and would have said so. If he did not, why does he say he paid him or satisfied him in the settlement? This part of the answer betrays, at once, a consciousness of the wrong done the complainant and an insincerity in the answer, and apprizes the court of what may be expected to be found in other parts of it. Now, in reference to these vessels, the answer, in another parts of its voluminous statements, (it requires great labor to reduce it to simples,) says that, after the dissolution, the complainant conveyed and delivered into his possession, or agreed that he should take, sundry property, to wit.: one-third of the schooner *Sun*, five-twelfths of the schooner *J. R. Rapelye*, and one-twelfth of the schooner *Uriah*, &c. That the said parts or shares of vessels were conveyed to him by the complainant by bills of sale under his hand and seal, dated July

4, 1833 ; and all the aforesaid articles of personal property, and of any other property whatever of the partnership, which he took into his possession, he so took under an express agreement and stipulation with the complainant for that purpose. And in another part of the answer he says, that at the time of the dissolution they held, as tenants in common in equal parts, two-thirds of the schooner Sun, ten-twelfths of the schooner J. R. Rapelye, and that each owned five-twelfths of the Uriah ; and that the complainant having, by said bills of sale, conveyed to him one-third of the schooner Sun, and five-twelfths of the schooner J. R. Rapelye, the complainant ceased to have any interest therein and the defendant became invested with all the interest in said vessels which had belonged to him and the complainant jointly, and was therefore entitled to use the same as his own ; and that, the complainant having conveyed to him, by one of said bills of sale, one-twelfth of the schooner Uriah, he became the owner of six-twelfths thereof, and the complainant remained the owner of four-twelfths thereof.

It thus appears that the defendant got, by bills of sale from the complainant, all his share of the schooner Sun, valued at \$1,000, all his share of the schooner J. R. Rapelye, valued at \$1,000, and one-twelfth of the schooner Uriah, valued at \$150, in all \$2,150, without any consideration whatever ; and yet the answer, in a former part of it, has said that he paid for these shares, or allowed and satisfied the complainant therefor in the settlement and division of the partnership business and property. He seems to consider that because the complainant, in the so-called division, got a small part of his own half of other property, that is to be considered as a payment or settlement for the complainant's interest in these vessels.

We will next look at the answer in reference to the real estate, in view of the testimony of John H. Doughty, sworn for the defendant, and the only witness as to what passed at the interview between complainant and defendant immediately before the work of drawing the deeds was commenced. John says that one morning his uncle (the complainant) came over to his father's (the defendant's) house ; it was the morning of July 2, 1833. That his uncle said to his father : " Enoch, J

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am tired of doing business this way, and let us dissolve." Father replied, "What way do you want to dissolve?" Uncle said, as near as witness can recollect, "You take and make me and my wife a deed for your part of the 100 acres where I live and your part of the Peggy Leeds place, and let me keep my half of the salt meadow, my half of the 20 acres, and my part of Zack's meadow, and I will make you a deed for all the rest." Father then said to him, as near as witness can recollect, "when shall we get the papers drawn?" Uncle said to him, "Have it done right away." Witness thinks his father asked his uncle who he would have to draw them. Thinks his uncle replied, "You can set John to draw them." As near as witness recollects they then talked over about the teams and other property, debts and the like. They agreed that they should draw the articles of agreement for the balance of the property. The witness says he set about drawing the deeds for the lands right away, beginning with the deed from his uncle to his father.

This is the only thing in the nature of a proposal from the complainant that we have in proof in the case; and, looking at the nature of the proposal and at the answers given by the defendant, it strikes me as very extraordinary, and would, of itself, very naturally suggest to any person acquainted with the amount and variety of property they held together an inquiry into the state of mind of the person who made it. It may be remarked, in passing, before proceeding to an examination of the answer as to the real estate, that, in this conversation detailed by John, nothing is said about the vessels; and yet the defendant took from the complainant bills of sale for his shares in vessels estimated at \$2,150, without paying one dollar of consideration for such shares. In this respect he seems to have gone to the letter, for "all the rest." But we proceed with the statements of the answer in reference to the real estate. The answer says that, on or about July 2, 1833, the complainant made to the defendant a distinct proposition for such dissolution and division, and the same was considered and debated between them; and at length the terms proposed by the complainant were, without much if any alteration or modification, agreed upon between them. What was the proposition

made by the complainant? Why not state it? Was it the proposition testified to by John? That is the only proposition in proof.

The answer proceeds to say, that it was then, that is, at or about July 2, 1833, agreed between them, that a part of the real estate should be taken by the complainant and a part by the defendant; that certain parcels of real estate should not be divided, but continue to be held by them as tenants in common; that the defendant should convey to the complainant all the defendant's right and interest in the real estate so to be taken by the complainant, and the complainant in like manner, convey to the defendant all the complainant's interest in the real estate to be taken by the defendant; and that the consideration to be expressed in each deed should be \$2,000; that the defendant should lease and convey to the complainant the right to cut wood and timber for his own use on certain lands in the answer after specified; that the complainant should take, as his own separate property, certain personal estate in the answer after mentioned; and that the residue of the joint personal property should belong to the defendant; that this defendant should have all the debts coming to the firm on book accounts or notes, and should pay all the debts against the complainant and defendant in Egg Harbor or Galloway, or in New York or Philadelphia, which, as he avers, comprised all or the chief part of the debts of the firm.

That, in pursuance of said agreement and understanding, he did, on the 4th of July, 1833, by deed of that date, convey to the complainant all this defendant's interest in certain tracts or parcels of land belonging to the firm, which were the same tracts which the complainant had selected and chosen for that purpose; and the complainant, in pursuance of their said agreement for dissolution and division of property, did, by deed of that date, convey to this defendant all the complainant's right in certain tracts of land and real estate in said deeds described; and being the tracts particularly set forth in the complainant's bill. The agreement here stated as having been made between them is, that certain lands (the answer does not say what lands) should remain undivided; that by an interchange of deeds

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each should become the sole and separate owner of certain lands ; (the answer does not say what lands ;) that the complainant should take as his own personal property certain personal estate, and that the residue of the joint personal estate should belong to the defendant ; that the defendant should have the debts due the firm, and pay the debts due from it, as aforesaid.

Now, taking this statement only, there is, from its uncertainty, nothing apparent on the face of it that is unreasonable ; but the defect of the defendant's case is that it appears that no such agreement was ever carried out. The deed made to the complainant is of the defendant's interest in one tract of 100 acres and another tract of 60 or 70 acres ; and the deed from the complainant is of his interest in all the other lands mentioned in the bill said to be from 6,000 to 7,000 acres ; and the defendant has not told us that any other lands remained to be divided. Whatever may have been the agreement which the defendant sets out in his answer, and whenever it may have been made, (the word *about*, as to time, is sometimes used in a wide sense, and something like this agreement may have been talked of at some time prior to July 2, 1833, when the complainant may have been of sound mind,) the result of the deeds was a very different state of things ; and how the defendant should have ventured to make such a statement, in view of what was actually done, it is difficult to imagine.

It was perceived, no doubt, that the defendant's statement of the mode in which the agreement was carried out would be imperfect if it did not say something as to what lands the defendant got ; and therefore after stating that the conveyance to him was of complainant's interest in certain lands, he adds, being the tracts set forth in the bill. Now were not those all the lands that belonged to them in common ? Were there any lands remaining to be held in common between them ? The answer is silent as to this ; though the bill calls for an answer showing all the real estate. The necessary conclusion is that the deed to the defendant was for all the lands except what complainant got. Whatever agreement the defendant may have seen proper to state in his answer, it is evident that the actual result of the papers procured from the defendant corresponds more nearly, if

it does not entirely, with the proposal John testifies to have been made by the complainant to the defendant on the 2d of July, 1833.

The answer then goes on to state that, in further carrying out their said agreement for dissolution and division, the complainant, on the 4th of July, 1833, by bills of sale, conveyed his said interest in the said vessels to the defendant.

Let us now see what the complainant actually got, in what is called the division. By the deed from the defendant to him, he got the one-half of a tract of land of 101 acres, and one-half of what is called the Peggy Leeds tracts, called in the deed 74 1-4 acres. By what is called the article of dissolution, he was allowed 200 cords of pine market wood on Absecom Landing, two grey horses and gearing, a two-horse wagon, a chair and harness, and the old sorrel horse. By another article, called in the answer a further agreement for the division of property, the complainant was to have his equal half of all the carpenter's tools, vessel screws, plows, harrows, shovels, forks, blocks, &c., (it is so in the agreement,) and of the salt they had on hand, and of the stock of store goods, and the iron at James Smith's and at home; and a lease of the cleared land on the south side of the mill, except where the surveyor's house stands, with the privilege of cutting market wood within certain boundaries, for five years, or as long as he may want it himself, or his wife Sarah; and the cedar wood for his own use, and oak timber for firewood, and what lumber he might want for his buildings, that was already sawed. This is the whole of what, by all the papers, the complainant got, in what is called the division of property. As to all the articles of which his half is allowed him, he, of course, only got what belonged to him; he was half owner. And his getting his half of any item of property can be no consideration or reason for defendant's getting any more than the other half of the same item of property. This disposes of the carpenter's tools, &c., &c., and store goods; each was to have his half of them. Next, the complainant was to have 200 cords of pine market wood on the landing. Now the bill charges that there were, belonging to the partnership, 1,000 cords of pine market wood on the landing; and the answer does not deny it.

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The complainant's half, then, of the pine wood on the landing was 500 cords. His being allowed to keep 200 of his own 500 cords can be no consideration for his conveying away the other 300 of his own 500 cords. The defendant would seem to think that his not taking all the defendant's 500 cords was a good reason or consideration for taking 300 cords of complainant's pine wood; and also, by the same rule, I suppose, a good reason, or consideration for taking the whole of the complainant's 800 cords of wood in the woods ready to be made into charcoal, and also the complainant's 750 bushels of charcoal; for the bill charges that the partnership had 1600 cords of wood in the woods and 1500 bushels of charcoal; and the answer does not deny it.

And as to the lumber the complainant might want for his buildings, that was already sawed, allowed him by one of the articles, the bill charges that there was a quantity of sawed lumber at the mill; and the answer does not deny it. Half of it, of course, belonged to the complainant. Whether the complainant's own half of it would not be abundant for his buildings, we have no means of telling, from the defect of the answer in not telling us how much there was. As to the live stock, it is clear, I think, that the complainant did not keep his half of that. The defendant got 6 mules, with gear, 4 horses, 3 heavy wagons, one light wagon, one sulkey, some harness with the horses, and a set of ox-chains. These, John says, were the principal articles of personal property his father took possession of. I think this is a very full half of the live stock, as against the complainant's two grey horses and gearing, a two-horse wagon, a chair and harness, and the old sorrel horse.

As to all the personal property, then, which the defendant got from the complainant, including the shares in the vessels, he did not pay one dollar of consideration. As to the lands, the defendant admits that no money consideration was paid. The parties lived near each other, each living on a farm of about equal value, as it would seem from John's testimony. If the agreement spoken of in the answer contemplated that each should become the separate owner of the farm he lived on, and that the residue of their large landed estate

should remain undivided, all that was necessary to be done was, for the defendant to convey to the complainant the defendant's interest in the farm the complainant lived on, and for the complainant to convey to the defendant the complainant's interest in the farm the defendant lived on. And I am disposed to think, from all the developments in the case, that this may have been, at some time, talked of. Be this as it may, putting the two farms against each other, as equal in value, we have the defendant's conveyance of half the Peggy Leeds place, of 74 acres, *i. e.*, 37 acres of land, without any buildings on it, and what is called the lease and cutting privilege, as a consideration for the complainant's half of 6,000 or 7,000 acres of land, *i. e.*, 3,000 or 3,500 acres, and that, as part of a transaction by which the defendant got, without any consideration whatever, the amount of personal property above stated, besides the debts due the firm over and above the debts due from it, of which the defendant has not seen proper to give in any account; the complainant's shares in the vessels being admitted to have been estimated at \$2,150, and the complainant's share of the wood alone, 1100 cords, amounting, I should suppose, to at least \$1,000 more.

It is not surprising that the defendant has laid before us such a volume of answer in endeavoring to meet a state of things like this, or to cover it up with words and carefully chosen language. He has, by such an answer, imposed great labor on all who have been put to an examination of it; (and possibly he has hoped that it might escape a thorough examination;) but when the labor of extracting from it the true state of things it discloses is performed, it reveals a case of most extraordinary character.

It would require more time than I have to devote to this case to go through, on paper, with the examination it might be profitable to make of this answer; to show, further, its defects in its answers to the charges of the bill; the insufficiency of its denials; and the allegations contained in it which, in my judgment, have been disproved. Suffice it to say, that I think the term which one of the counsel for the defendant ventured to apply to the bill (a very strong one,) is much more applicable to the answer. Indeed I have not been able to perceive its applicability to the bill at all.

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If the results produced by the writings signed by the complainant corresponds with any proposal ever made by him, it is not with what the answer would seem to state the proposal to be, but what John H. Doughty, in his testimony, states the proposal to have been on the morning of the 2d of July, 1833; and that proposal, and the manner in which it was met by the defendant, goes far, of itself, to show the truth of the main allegation of the bill, that the complainant was not then of sound mind and competent for the transaction of business, and that the defendant was fully aware of this. I think that, independently of the testimony in the cause, one could hardly read John's account of what passed at that interview without inquiring whether the complainant was in his right mind.

The answer says that "certain" lands were to be taken by each party, leaving the rest of the lands to remain undivided between them; and that "certain" personal property was to be taken by the complainant, and the residue of the personal property by the defendant; and that, in pursuance of the said agreement, the defendant's interest in *certain* lands was conveyed to the complainant, and the complainant's interest in *certain* lands was conveyed to the defendant, being the lands mentioned in the bill; and that, by other writings, the complainant got 200 cords of wood, his half of some personal property specified, two grey horses, &c., as above, and the defendant got all the rest of the personal property; the complainant also getting the lease and cutting right specified. This is the blind shape of the answer. It is not the answer which the bill required. The bill required the defendant to state all the property, real and personal, that belonged to the partnership; and to state what the complainant got and what the defendant got; and to state what, by any agreement set up in the answer, the complainant was to get, and what the defendant was to get. To say that by an agreement the complainant was to have *certain* lands, and the defendant *certain* other lands, being the lands mentioned in the bill, without saying whether those other lands got by the defendant were all the lands except what complainant got, is not sufficient under such agreements as he sets up, showing that certain lands were to remain undivided.

The reason of the peculiar shape of this answer is manifest. To do what the bill plainly requires, state all the property, real and personal, which belonged to the parties in common, say 6,000 acres of land, vessels the interest of the complainant in which was estimated at \$2,150, 2,600 cords of wood, each one's half therein being 1,300 cords, &c., (without now stating the other personal property;) then to say that in pursuance of an agreement that certain of the real estate should be divided, leaving the residue of the real estate in common, and that complainant should take certain personal property, and the defendant all the rest, the complainant's own half of a small part of the real estate was conveyed to the complainant, and he, the defendant, took all the rest of the land, and that, of the said wood, the complainant retained 200 of his own 1300 cords, and the defendant took all the rest, and took also the interest of the complainant in the vessels, valued at \$2,150, and that the complainant retained his half of certain other personal property; to make this statement plainly was more than the defendant's courage was equal to. And yet this is the result of the answer when its involution is unraveled. It is emphatically a most extraordinary case; such a one as I have never met with in my experience or reading; I mean the case developed by the answer alone.

The only satisfactory solution of the question how such a division of property could have been obtained by the defendant and submitted to, nay, it is said, proposed by the complainant, is to be found in the testimony as to the condition of the complainant, in body and mind, at the time it was made.

I am clearly of opinion, that the testimony, if not of itself sufficient, (I am inclined to think it is,) yet, taken in connection with the unconscionable character of the so-called division, is entirely sufficient to show that the complainant was incompetent for the transaction of business. I do not propose to enter upon a minute examination of the testimony. But, it is not necessary for me to say that the complainant was absolutely *non compos mentis*; to entitle him to relief in such a case as this. He was, to say the least, by long intemper-

ance and severe sickness, producing frequent convulsions, reduced to a very low state of weakness of body and great imbecility of mind; the defendant was his elder brother, who had long been a partner with him in business, and therefore in a relation to exercise great influence over him; and the bargain was such as no honest and fair man would think of proposing, or ought to be willing to accept. In this case it is said it was proposed by the complainant. If it was, the proposal was, in itself, so strong evidence of imbecility or delusion that no man should have accepted it.

Relief in equity on such and similar grounds has been granted in numerous cases; and Courts of Equity have frequently inferred fraud from circumstances less conclusive than the facts in this case. 2 *Harr. & John.* 422; 2 *Harr.* 502; 2 *Litt.* 118; 1 *Aik.* 390; 1 *Munf.* 557; 6 *Harr. & John.* 435; 14 *John. Rep.* 527; 6 *Yager*, 75; 2 *Root*, 216.

The defendant's counsel, pressed with this view of the case, argued that the case made by the bill was a case of total insanity and no consideration whatever, and not a case of imbecility and inadequate consideration; and that the case as made in proof did not come up to the case charged in the bill; and that, if it did not, the court could not relieve on the ground of imbecility and inadequate consideration, however great the imbecility or however gross the inadequacy. This argument cannot prevail. The bill charges that the complainant was deprived of his right reason, and was of unsound mind and totally incapable of transacting any business, or of the government of himself and management of his affairs. I have intimated before that, to my mind, the proof comes up to this charge. But if it does not, but comes up to the state of mental imbecility I have before stated, sufficient under the circumstances to call for relief, I know of no rule or reason why relief for such cause should not be granted under such a charge as is made in the bill. Relief in such cases cannot depend on the question whether the precise degree of imbecility charged in the bill is proved. Imbecility calling for relief under the circumstances may be proved, and acted upon by the court, though it be not the degree of imbecility charged. But

I do not understand the charge in the bill to be a charge of total insanity.

As to consideration, the bill states that the complainant and defendant were seized of certain lands and possessed of certain personal property mentioned in the bill; that after the complainant recovered from his affliction, the defendant, to his surprise, informed him that he had, on the 4th of July, 1833, not only executed a bill of sale of all his right to the said personal property, but also a deed for all his right in the said real estate; that the complainant then told the defendant, if such was the case, the defendant well knew that the complainant had received no consideration therefor and that both were fraudulent. And the bill afterwards states, that the complainant has never received any consideration money from the defendant for the said personal property or the said real estate.

Now it is admitted by the defendant that not one dollar of the consideration money mentioned in the deed and bills of sale from the complainant to the defendant was ever paid; and I have shown that as to the personal property not a particle of any consideration whatever, money or other, was ever paid or given. But it is said there was some consideration, though not a money consideration, for the deed. What was the consideration? The complainant and defendant were owners in common of numerous and some of them large tracts of land. Is the conveyance by one, of his interest in one tract, so that the other may become the sole owner of that tract, a consideration for anything more than a conveyance to him of the other's interest in a tract of equal value, so that he may become the sole owner of that? Would it be a consideration on which the conveyance to him of all the lands they held in common, however extensive, could rest? It is different from the case of a sale; it is a division to the extent of each taking an equal portion of property; and beyond that it is as if the rest of the lands remained in common and the one gets a deed for the other's interest in those remaining lands without any consideration. As to what is called the lease and cutting privilege on a small portion of the lands held in common, it is only retaining a small part of his own, a small portion of the number of acres his own half would give him; and it is no more

a consideration for the conveyance of the residue of his interest than the omission of the defendant to include all the complainant's lands in the deed would have been a consideration for the parts included in the deed. The complainant was allowed to retain a small interest in a small part of his own; and this is claimed to be a consideration for all his interest in all the rest of his own; or in other words, the defendant's not taking all that belonged to the complainant is claimed to be a consideration for what he did take. But I see nothing in the case which should induce the court to refuse relief on this ground. It will hardly be expected that the court in such a case, could deny relief on so refined a position.

Again, it was contended that the complainant was too late in his application for relief; that twelve years elapsed before he filed his bill. It might be a sufficient answer to this to say, that the defendant sets up no such ground of defense in his answer; but applies himself seriously to the sustaining of the transaction in all its length and breadth. But another, and I think quite sufficient answer, is furnished by the pleadings and proofs in the case. The bill states that notwithstanding the deed, the defendant and complainant continued to cut upon the said property, and use and occupy the same after the same manner as had been done previous to June, 1833, up to July, 1844. That in or about July, 1844, the defendant ordered the sawyer at the mill not to saw any logs the complainant might have brought to the mill, and took the exclusive possession thereof and forbid the complainant and his workmen from cutting upon or using the aforementioned premises.

The answer says, that the defendant, at different times, requested the complainant to account to and settle with him for various matters and transactions had and done between them since the dissolution, but the *defendant* (meaning the complainant) has always refused to do so; and that, in order to compel a settlement, the defendant was at length compelled to bring a suit, and did so. That neither the complainant nor any other person has cut on said lands, or used the same, unless by the defendant's consent, without being held by him as a trespasser. That the complainant has, at different times, cut wood on said lands, but

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only by permission of this defendant, and in such manner and at such times and places as this defendant permitted, or, if he has cut without such permission, it has only been as a trespasser. That for the wood and timber so cut he has always expected the complainant would pay him, and that the complainant never alleged that he had a right to such land as part owner thereof, until about the time the defendant sued him. This is a fair specimen of the answer throughout. It is no answer to the charge, and must be considered an admission of it. Did the complainant ever ask his permission to cut? Did the defendant ever tell the complainant he was a trespasser, or ever forbid his cutting until just before he sued the complainant? And was it not on being then forbidden that the complainant claimed his right, as part owner of the land, notwithstanding the deed. So, as to sawing the lumber at the mill, the same kind of attempt to answer the charge in the bill is made. He says the complainant has, also, since the dissolution, had considerable lumber sawed at the mill, and then adds, immediately, and has had sundry other dealings with this defendant by means whereof he has become largely indebted to him, and has, also, dealt considerably with the firm of E. D. & Son, at their store and in other ways, and is now indebted to them in a considerable sum; and then says that, the complainant having been repeatedly requested to come to an account and settlement of said accounts, and to pay what was in arrear and due them, (without saying when requested,) and having always refused so to do, he and the said firm of E. D. & Son were at length compelled to resort to compulsory measures. That accordingly he directed the sawyer at the saw mill to saw no more lumber for the complainant without orders from him, the defendant, and forbid the complainant and his workmen from cutting on said lands; and he and the said firm of E. D. & Son each commenced an action against the complainant to recover from him the sums so due them, and which he always neglected and refused to account for and pay. Now all this, instead of being a denial, shows, substantially, the truth of the charge in the bill, that, notwithstanding the deed to the defendant, the complainant continued to cut wood on the lands mentioned in the deed; to haul timber to the mill there-

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from to be sawed ; and to get his groceries and goods at the store. The complainant seems carefully to avoid saying when it was that he forbid his cutting, &c. The bill says it was not till 1844. The answer does not deny this. It must be taken as true, then, that things went on as above stated until 1844. And such a state of things certainly furnished strong grounds for a brother to expect or at least to hope, that a brother did not intend to enforce, or attempt to enforce against him, writings of so unconscionable a character as those which had been procured from him in his imbecility, when away from his family, and without any knowledge on their part of their contents. I say this with assurance, notwithstanding the effort in the answer and in a part of the testimony, to induce a belief that the complainant's wife was made acquainted with the contents of the papers. As to the bills of sale, there can be no pretence that the wife knew anything about them, or of any intention to have such papers executed. They were not drawn till after the complainant and defendant got to Doctor Canfield's ; and it does not appear that anything was said to her, or even to the complainant, about such papers, before the complainant and defendant left the complainant's on the morning of the day on which the papers were executed. And as to the deed from the complainant for the lands therein specified having been read by the complainant's wife, or even by the complainant himself, the idea is utterly inadmissible by any one who will read that deed and the testimony as to what passed at the complainant's house, on the morning of that 4th of July, and as to the time between the defendant's going there and the complainant's leaving with him.

And, besides the answer to the charge of the bill as to the reason of the delay, we have the testimony of witnesses, at least two, who testify to their being employed in cutting under the direction of the complainant, and that the defendant did not forbid them. I am of opinion that the silence of the defendant, and his acquiescence in the course pursued by the complainant, is a course amounting to a continual affirmation of the complainant's right notwithstanding the deed, and to a continual reproach on the defendant and expression of a belief that he would not attempt to enforce the deed ; and form, if not a justification for the

complainant's delay, yet an excuse in view of which the court cannot, in a case like this, refuse its aid. 1 *Story*, sec. 529. The time within which a fraudulent transaction may be asked to be set aside depends on circumstances and the sound discretion of the court. *White's Eq. Ca.* 144, 5. Indeed, a distinguished Chancellor, in 2 *Eden's Rep.* 280, said, that delay would never purge a fraud while he sat in the court; that every day added to the injustice and multiplied the oppression.

But in this case the lapse of time is entirely too short to defeat the complainant on the ground of delay. No case can be found in which such a lapse of time in such a case was held to be a bar.

And I think the circumstances, above mentioned, accounting for the delay, in connection with the fact that the defendant has not in his answer asked any protection on account of delay, are sufficient to induce the court not to interpose the objection of delay from any consideration, of policy, even in reference to the bills of sale for the personal property. It was all one connected transaction; and I think it should be wholly declared fraudulent and void.

But I am unwilling to consider the partnership as subsisting in reference to the personal property. It will be held to have been dissolved on the 4th of July, 1833.

The defendant will be directed to account for half the rents and profits of the lands, other than the respective farms on which the parties reside, and for half the proceeds of the wood and timber taken therefrom; and for the value of the complainant's share of the vessels; and for the complainant's half of the other personal property to an extent sufficient to make up, with what he got, the half of it.

Order accordingly.

REVERSED. 3 *Hal. Ch.* 643; Cited in *Gifford, adv. Thorn*, 1 *Stock*, 702 725; *Overt v. Overt*, 1 *Beas*, 423, 430.

CASES IN CHANCERY.

DECEMBER TERM, 1848.

THE HAMBURGH MANUFACTURING COMPANY and others *vs.* JOS. E. EDSALL, ELIAS L'HOMMEDIEU and others.

It had been determined that, by an agreement between creditors of an incorporated manufacturing company and the company, a manufacturing establishment was held by A., in trust, first, for the payment of the creditors, and then for the company. The property was occupied by B., in its appropriate use, in connection with, or with the consent of A.; and an order had been made in a cause in which the company was complainant, and A. and B., were defendants, directing both A. and B. to account for the rents and profits, for the purpose of ascertaining whether they had not amounted to sufficient to pay the debts; and the account had not yet been taken, B.'s ability to respond was admitted: and the property was of a nature to be injured if not used. In this state of things, the company applied for a receiver to take charge of the property. The motion was denied.

A denial that property is held in trust does not make the appointment of a receiver necessary on the establishment of a trust.

Where there is no ground for apprehension of loss by permitting the property to remain, in its appropriate use, in the occupancy of him who has the use of it, and his ability to respond for its use is admitted, and he is one of the persons who have been ordered, in the cause, to account before a Master for the rents and profits that may have been received, a receiver will not be appointed to take charge of the property.

The decision of the main points in this case by the Court of Chancery is reported ante, vol. 1, p. 249; and the decision by the Court of Errors and Appeals is reported ante, vol. 1, p. 658. The last mentioned decision was made in July, 1848.

A motion was made on the 3d of November, 1848 in behalf of the Hamburg Company or some person or persons interested in that company as stockholders, for the appointment of

a receiver; the bill having prayed for a receiver, and the court having not yet appointed one.

B. Williamson and *W. Pennington* in support of the motion.

D. Haines, R. Hamilton and *S. G. Potts*, contra. They cited 1 *Green's Ch.* 179; 10 *Law Lib.* 106; 2 *Story's Eq. Jur.*, sec. 834; *Edw. on Receivers*, 20, 21.

THE CHANCELLOR. By an article of agreement made by some of the creditors of the Hamburgh Manufacturing Company, among them, they covenanted and agreed with each other to unite with each other in the purchase of the property of the Hamburgh Company, then advertised to be sold at Sheriff's sale, and also of the mine farm of the Clinton Manufacturing Company, then also advertised to be sold at Sheriff's sale; (having recited in the said agreement that they were in danger of losing their claims against the Hamburgh Company if the Hamburgh property sold for less than \$17,000;) and constituted L'Hommedieu, who was one of the said agreeing creditors of the Hamburgh Manufacturing Company, their agent and trustee to purchase the said properties for their use; and authorized their said trustee to raise, by bond and mortgage on the property, sufficient money, &c.; and authorized and directed the said trustee to lease the said premises, and to agree with the lessee, if he desires it, to sell to him the said premises upon his securing to the said trustee the cost of the premises, including their respective claims, with interest; and to make a deed of release to him in full. The sales were made, and the Sheriff gave absolute deeds to L'Hommedieu.

Upon the testimony in the cause, the Court of Chancery held, that it appeared that Edward W. Pratt, who had been a large stockholder in both these separate Companies, but who had taken the benefit of the insolvent law, and had, in pursuance of the provisions of that law, made an assignment of all his estate to his assignees in insolvency, was, by a side agreement between the said agreeing creditors of the Hamburgh Company and himself, to be the lessee under the said agreement, and the person to

whom both properties were to be conveyed by the said trustee, on his paying the claims of the said agreeing Hamburgh creditors; and that, by reason of means used, in connection with this agreement, which prevented competition and produced a sacrifice of the property of both companies, the sales was void; and that, consequently, as respected the Hamburgh property, a trust resulted in favor of the Hamburgh Company and its creditors generally; and that, as respected the property of the Clinton Company, it remained the property of the Clinton Company, and a trust resulted in their favor; but that, as the Clinton Company was not before the court, nothing could be done in this suit in the way of relief to them or their creditors.

On appeal from the decree, the Court of Errors and Appeals decided, that the Sheriff's deeds, for both properties, to L'Hommedieu were good; but "that the facts and circumstances led irresistibly to the conclusion, that the sales were not considered by the parties as absolute and beyond redemption; but that Pratt, either for himself or the Company, had a reversionary right;" and in this view of the case sustained the decree for an account as to the Hamburgh Company's property; which was a decree against L'Hommedieu, who took the deeds, and Edsall, who was one of the said agreeing creditors of the Hamburgh Company, and who had gone into possession of the property under, or in connection with, or with the consent of L'Hommedieu—he, Edsall, also holding a mortgage on a part of the property. And as to the property of the Clinton Manufacturing Company, the Court of Errors and Appeals decided, that L'Hommedieu held that in trust for the same persons for whom he held the Hamburgh Company's property. I might remark here, that it is manifest that the sale of the property of the Clinton Company was intended, by the said agreement among a portion of the creditors of the Hamburgh Company, to be absolute, and to divest all the title of the Clinton Company, and vest it in L'Hommedieu in trust for the said agreeing creditors of the Hamburgh Company. And it might be further remarked that, if the deed to L'Hommedieu for the property of the Clinton Company be valid, it is difficult to perceive how the Hamburgh Company can have any reversionary interest in the property of the Clinton Company, or

any interest at all in it. If the deed to L'Hommedieu for the property of the Clinton Company be good, it would seem that he would hold this property either absolutely, according to the purport of the deed to him, or, if in trust, in trust for the persons for whom he agreed to hold it in trust, that is to say, that portion of the creditors of the Hamburgh Company who entered into the said agreement; and not for the Hamburgh Company, the complainants in the case.

As to both properties it was clear to my mind that the very object of Pratt and the agreeing creditors of the Hamburgh Company, in the arrangement they made, was that the sales of both properties should be absolute as against both Companies; and that the Clinton property should go into the hands of L'Hommedieu to aid in paying the claims of these agreeing creditors of the Hamburgh Company, which they despaired of getting out of the Hamburgh property; and then, on Pratt's paying the amount of those claims, he, individually, and not the Hamburgh Company, was to have both properties, free from all debts except the mortgages. This was the very arrangement which put an end to all competition and caused the sacrifice of both properties.

It was clear to my mind, that if the deeds were valid, the defendants were right in saying, that L'Hommedieu was not a trustee for the Hamburgh Company, but was a trustee for them, the said agreeing creditors of the Hamburgh Company. And, in this view, the only ground on which any other trust could be reached was by declaring the deeds void; thus reaching a resulting trust in favor of the Hamburgh Company in reference to the Hamburgh property. But a trust could not result to the Hamburgh Company in the Clinton property by the setting aside of the deed to L'Hommedieu for that property. Whether that deed be good or bad, there can be no trust in L'Hommedieu of the Clinton property in favor of the Hamburgh Company. If the case stood now as it did when it passed from my hands before, there would be a ground for the appointment of a Receiver arising from the constructive fraud by which the property got into the hands of L'Hommedieu. But by the view taken of the case by the Court of Errors and Appeals that ground is taken away. The deeds have been declared by that Court to be

good ; and L'Hommedieu is declared to be a trustee of both properties, first, for the said agreeing creditors of the Hamburg Company, or, it may be, for all the creditors of the Hamburg Company, the language of the deed does not certainly indicate which, and, after the debts of those creditors shall be paid them, for the Hamburg Company. And on the case being remitted to this court, an order was made directing an account, in order to ascertain whether the rents and profits have been sufficient to pay those debts, and how much, if any, of the rents and profits has been applied for that purpose ; and this matter of account is now in the hands of a Master. What will be the result of the account is entirely uncertain ; the said creditors have not yet been paid. In this state of things, the Hamburg Company ask, that the property may be taken out of the hands of the trustee so agreed upon, and put into the hands of a Receiver, against the consent of the said creditors by whom, with Pratt's consent, the said trustee was appointed ; the said creditors preferring that the said trustee be continued in the trust. The works on the property (iron works,) are now in operation, conducted by Edsall, a man experienced in the business, and of unquestioned responsibility, and who, also, has been directed to account before the Master. And all agree, that to stop the works and permit them to stand unemployed would be ruinous to them. And a Receiver is not asked for the purpose of selling the property.

The principal ground on which the appointment of a Receiver was pressed was, that L'Hommedieu and Edsall denied the trust. It is true they denied any trust in favor of the Hamburg Company ; and, if the deeds be valid, it is difficult, as I have before said, to perceive how there can be a trust in favor of the Hamburg Company as to either of the properties, and much more difficult to see how there can be a trust in favor of the Hamburg Company as to the property of the Clinton Company ; but they admitted the trust created by the words of the said agreement among the said agreeing creditors. But a denial of a trust would not, of itself, make the appointment of a Receiver necessary on the establishment of the trust. Where there is no ground for apprehension of loss by permitting the property to remain, in its appropriate use, in the occupancy

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of him who has the use of it, and his ability to respond for its use is admitted, and he is one of the persons who have been ordered in the cause to account before a Master for the rents and profits that may have been received, I see no good end to be attained by the appointment of a Receiver for the purpose of taking charge of the property.

The motion cannot prevail.

Motion denied.

CITED in *Hamburgh Mfg. Co. v. Edsall*, 1 *Beas.* 406.

THE NEWARK AQUEDUCT COMPANY and others *vs.* JAMES N
JORALEMON and others.

A. having contracted to buy a lot of land from B., and there being judgments against A., it was agreed between them that B. should make the deed to a brother of A., in trust for an infant son of A., the brother and son having no knowledge of the transaction at the time, and that the deed should not be recorded; and that when A. should settle with his creditors, B. should make a deed to A. A. paid the money for the lot, and B., afterwards, in the absence of A. from the State, made the deed to the brother in trust &c. and had it recorded. Subsequently C. applied to A., who was in possession of the lot, for the purchase of it, and A. agreed to sell it, and to procure a deed from the brother to C. C. requested A. to show him the title papers, but the deed to the brother could not be found. or was not produced. C. then applied to the Clerk of the County for a certificate of the title as it appeared on the records; and the Clerk's certificate, by mistake, gave the deed from B. to the brother as an absolute deed, unlimited by any trust; whereupon C. took a deed from the brother and paid the purchase money. C. had no notice of the trust, other than the constructive notice by the record.

Held, that C.'s title was good.

The facts stated in the bill were admitted in the answer; the infant defendant answering by James N. Joralemon, his guardian. They are shortly as follows :

In October, 1842, James N. Joralemon agreed to buy of Lucas Carter a lot of land in Newark; but the said James being in embarrassed circumstances, it was agreed between them, in order that the lots should be secure from the liens of judgments against James, that the deeds should be made to Samuel L. Joralemon, the brother of the said James; and, with a view of providing against the contingency of the said lot descending to the heirs of said Samuel in case of his death, it was agreed that the deed to Samuel should be in trust for the benefit of Lewis Joralemon, an infant son of the said James. Neither Lewis nor Samuel had any knowledge of the transaction at the time; and it was agreed that the deed to Samuel should not be put on record, but should be held by Samuel until James could find it convenient to make a settlement with his creditors, when the lot was to be conveyed by Carter to James. James gave Carter his note for the consideration money, \$500; which he afterwards paid.

James, after making the arrangement, went to New Orleans; and during his absence Carter had the deed drawn and executed, acknowledged and recorded. The deed was to Samuel L. Joralemon, his heirs and assigns, in trust for the said Lewis, his heirs and assigns. For a long time after the deed was given it remained in James's possession; the said Samuel and Lewis still continuing ignorant that any such conveyance had been made.

In 1843, Hanford Smith, since deceased, applied to James for the purchase of all the real estate whereof he was then possessed in Clay street and on the Passaic river, in Newark, including the lot so conveyed to the said Samuel; and James agreed to sell the same to him; and that a deed should be given therefor by the said Samuel; and accordingly, at the request of James, Samuel and his wife, by deed dated January 1, 1845, in consideration of \$——, paid by Smith to Samuel for the benefit of the said James, conveyed the said property to Smith, his heirs and assigns, in fee simple, unlimited by any trust, with full covenants of warranty.

Preparatory to the purchase by Smith, he requested the said James to hand him the deeds showing his title to the property about to be conveyed; but the deed for the said lot could not be found; whereupon Smith caused the records of the county of Essex to be searched; and a regular deduction of title was thereupon made out by the Clerk of said County, under his hand and seal; in which the deed from Carter to the said Samuel L. Joralemon for the said lot was noted without any qualification whatever; but appeared therein as a deed in fee simple, unlimited by any trust.

Smith afterwards sold the said property to the complainants, The President and Directors of the Newark Aqueduct Company, by deed dated April 1, 1845; and in April, 1846, the said Aqueduct Company, for the consideration of \$1,000, sold to the complainants Stoudinger and Baldwin a part of the said lot.

The complainants, before their respective purchases, consulted the said certificate or deduction of title made by the Clerk; and were induced to take a deed for the property from the fact that the said certificate exhibited a clear and satisfactory title to the same in the said Samuel at the time they,

respectively, purchased ; and supposed that an absolute and indefeasible title was conveyed to them by the said Samuel.

F. T. Frelinghuysen for the complainants.

No counsel appeared for the defendants.

THE CHANCELLOR. The consideration money having been paid by James N. Joralemon, the conveyance to Samuel, in trust for the infant son of James, was voluntary ; and the facts show that it was for an improper purpose. The subsequent purchaser, Smith, who took the conveyance from Samuel, was a *bona fide* purchaser without actual notice of the trust ; and the certificate of the Clerk, on the faith of which he purchased, represented the deed to Samuel to be an absolute deed, unlimited by any trust. Smith's equity is superior to that of the infant. His title will be established.

Decree accordingly.

EZRA PARKHURST vs. JOSIAH F. MUIR.

In 1839, A., being the owner of a mill site, sold half of it to B.: and A. and B. agreed to erect a factory thereon, and to carry on a manufacturing business in partnership. No written articles of partnership were made; nor was any time fixed for the duration of the partnership. A. and B. mortgaged the property to raise money to put up the building required, and about \$3,000 remained due on the mortgage at the time of the filing of the bill. B. had given A. a mortgage on the half he purchased, for \$400 of the purchase money; all which remained due at the filing of the bill. In October, 1848, B. filed a bill, charging that A. excluded him from taking any part in the business; and refused to give him any information as to his sales and collections; and had sold goods of the partnership in his own name, and applied the proceeds to his own use; and refused to dissolve and come to a settlement; and that on a just settlement a considerable balance would be due him, B.; and prayed a dissolution and account, and a Receiver. The bill did not charge that A. was unable to respond.

The answer denied the exclusion: stated that, in March preceding the filing of the bill, the parties had a settlement, by which the complainant acknowledged himself indebted to the defendant in \$609,92, beyond the said mortgage debt of \$400, and gave his note therefor to the defendant, no part of which had been paid; and that it was thereupon agreed by complainant that defendant should collect from the partnership business sufficient to pay the said note; that he, accordingly, after said settlement, sold goods of the partnership, (stating particularly what goods,) and charged himself with them on the books of the partnership; and that the complainant's share of the net profits of the partnership since said settlement (giving the receipts and payments of the partnership since that time) was not sufficient to pay the said note; and denied that he ever refused to come to a settlement, and stated that he has been at all times, and is ready to account; and denied any design to act unfairly.

A motion for a Receiver was denied.

On the 18th October, 1848, Ezra Parkhurst exhibited his bill, stating, that in or about May, 1839, he entered into an agreement with Joseph F. Muir to form a partnership with him in the business of carrying on a saw mill and manufacturing paper, in the name and style of Parkhurst & Muir, on a mill site on the Passaic river, in the township of New Providence, which at that time belonged to the said Muir; which agreement was not reduced to writing, and was to the effect following: That the complainant should purchase half of the said mill site and real estate thereunto appertaining, from the said Muir, for \$2,250, and that the complainant and said Muir should each furnish half of the

capital necessary to build a paper mill on the said premises and carry on the saw mill and paper making business, and each of them to share equally in the profits and loss of said business; and that each of them should own the half of the said mill site and real estate, and each be at half the costs and expense of building a paper mill and making the improvements and repairs necessary to carry on the said business; and no time was agreed upon for the limitation or continuance of the said partnership.

That the said partnership business was entered upon, and has ever since continued to be carried on by the complainant and said Muir, under and in pursuance of the said agreement, except when interrupted by Muir, as in the bill after stated; no other agreement having been made between them in relation to the said partnership.

That, immediately after they entered into the said partnership, the complainant paid the said \$2,250, in the manner agreed upon between them, to the said Muir, and they erected a paper mill on the said premises, and put the necessary machinery therein; and, in the course of several months after entering into said partnership, they commenced manufacturing paper in the said mill, and ever since that time have continued to carry on the said business together, until August last; since which time Muir has prevented the complainant from participating in the said business, and still persists in excluding the complainant from participating in the transaction of the said partnership business, and refuses to consult with the complainant in relation thereto, and refuses to give the complainant any information of his transactions of the partnership business and of his sales of partnership property and collection of partnership debts. That during the last winter he was very much dissatisfied with the manner in which Muir was conducting the said business, and so informed him. That Muir has taken the books of account and of the business transactions of the partnership from the paper mill, where they belonged and had ever been kept, and carried them to his own house, against the consent and remonstrance of the complainant; and refuses to bring them back to the said mill, and to permit

the complainant to have access to the same, against the repeated request of the complainant.

That Muir has lately sold and sent away from the mill, on his own individual account, a quantity of the paper made at the said mill, without the consent or approbation of the complainant, and marked the same with his own name, instead of the name of the firm, as they had always been in the habit of doing ; and he marked the said paper with his own name because he had sold it for his individual benefit ; but without the knowledge or consent of the complainant.

And the complainant charges that Muir has recently applied to his own use large sums of money from the receipts and profits of the business, greatly exceeding the proportion thereof to which he was entitled, and refuses to account to the complainant for the same. And the complainant believes and charges, that if Muir is permitted to remain in possession of said mill, and to sell the partnership property and collect the partnership dues, the complainant will be deprived of his share and interest in the partnership property, and be compelled to pay the partnership debts.

That Muir declares to some persons that he has dissolved the said partnership ; and at other times declared that he has agreed with the complainant to carry on the business on terms by which each partner is to use the mill on his own account and interest ; all which the complainant charges to be untrue.

That Muir, on the 19th of September, 1848, addressed and sent to the complainant a note in writing, dated that day, in which he proposes to the complainant to keep on in business with him for one year longer, and on the 12th of October, 1848, addressed and sent to the complainant a note, dated that day, in which he alleges that he is not in partnership with the complainant in making pasteboard, and that he never intended to be ; whereas the complainant charges, that they have been in partnership in the said paper mill since 1839, as above stated, and that the partnership has never been dissolved ; and Muir refuses to dissolve the partnership and come to a fair and just settlement with the complainant of their partnership accounts.

That since Muir has declared that the partnership was dis-

solved, and within a month past, he has purchased stock in his own name and mixed it with partnership stock and materials at the mill, which he is now manufacturing and appropriating to his own account, against the consent and remonstrance of the complainant ; and has lately bought, on the partnership account, and put in the mill, unnecessary and useless machinery, against the consent and remonstrance of the complainant.

That Muir has boasted that he kept in his possession the said partnership books, and that the complainant knows nothing about the situation of their business affairs ; and the complainant believes, from his conduct, that it is his intention, if possible, to compel the complainant to sell out to him the complainant's interest in the partnership property at a sacrifice, and through fraudulent means and by concealing from the complainant the true condition of their partnership affairs, to possess himself of all the partnership property.

The complainant charges, that on a true settlement of said accounts it would appear that a considerable balance is due him from Muir in respect of said partnership dealings ; but nevertheless Muir is collecting the partnership debts and applying the same to his own use ; which he is enabled to do by means of his possession of the books of account and of the partnership transactions ; whereby the balance due from him will be increased, to the great loss and injury of the complainant.

That he has from time to time, by himself and his agents, applied to Muir, and hath requested him to come to a full and fair account in respect of said partnership transactions, and to agree to a dissolution of the partnership. But that he refuses to agree to an amicable and mutual dissolution of the partnership and to come to a full and fair settlement of said accounts and to pay the complainant the share of the moneys and profits due the complainant in respect of the said partnership, and to permit the complainant to participate in the said partnership transactions. The complainant charges that since March last, Muir has collected from \$3,000 to \$5,000 of the partnership debts, and has appropriated to his own use more than \$1,000 over what he was entitled to for his share of the same. That within a month past Muir has refused to come to a mu-

tual and amicable dissolution, though he was requested to do so by an agent of the complainant sent to him for that purpose ; and has refused and continues to refuse to permit the complainant to participate with him in the possession of said paper mill, and in the transaction of the said partnership business ; and within a month past has declared that he was advised to turn the complainant out of possession of said mill, and that he intended to do so, and that he did not mean to let the complainant have anything to do with the said business.

The bill prays, that the partnership may be dissolved, and that an account may be taken of the partnership dealings and transactions ; and that Muir may be decreed to pay the complainant what, if anything, shall be found to be due to him, the complainant being willing and offering to pay Muir what, if anything, shall be found due to him from the complainant ; and that in the mean time Muir may be enjoined from collecting any of the dues, moneys, rights or effects of the partnership, and from contracting any partnership debts, and from selling, transferring, or disposing of any of the effects of the partnership ; and that a Receiver may be appointed for the benefit of the creditors of the partnership and of the complainant and Muir ; and for further relief.

Affidavits were annexed to the bill.

On the reading of the bill, an injunction was allowed.

On the 3d of November, 1848, a motion for a Receiver was made, upon notice.

The answer of the defendant was read in opposition.

The answer admits the partnership for carrying on a saw mill and making pasteboard, and not paper ; though the firm afterwards entered into the manufacture of paper ; that the agreement forming the partnership was not in writing, and was to the effect stated in the bill ; and that no time was agreed upon for the limitation or continuance thereof ; and that said partnership business was entered upon as stated in the bill.

The defendant denies that the said partnership business

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was in anywise interrupted by him ; and that no other agreement except the agreement in the bill mentioned was ever entered into between him and the complainant in reference to the partnership. He says that the \$2,250 agreed to be given to him by the complainant for the half of said mill site and real estate was secured to be paid as follows : he and the complainant, on or about May 16, 1839, gave to Jonathan M. Meeker their joint bond for the payment of \$3,700, in instalments, with interest payable annually ; the payment of which bond was secured by a mortgage executed by him and the complainant and his wife upon the whole of said real estate of the said partnership ; and the sum of \$400 was secured to be paid to this defendant by the bond of said Parkhurst, dated May 16, 1839, with interest ; the payment of which last mentioned bond was secured by a mortgage executed by said Parkhurst and wife to this defendant upon said Parkhurst's undivided half of said partnership real estate. That on the said bond and mortgage given to Meeker there has been paid, out of the funds of the partnership, all the interest due thereon up to May 1, 1848, and \$1,300 of principal ; and that no other payments have been made thereon. That on the said bond and mortgage given by Parkhurst to this defendant no money has been paid for principal or interest.

He admits that he and the complainant erected upon the premises a pasteboard mill and put the necessary machinery therein ; and, in the course of several months after entering into the partnership, he and the complainant commenced manufacturing pasteboard. That the complainant did not comply with his agreement in the bill mentioned to pay half of the cost of putting up the necessary improvements on said premises ; but that, on the contrary, this defendant paid on that account considerably more money than the complainant.

He says that on or about August 16, 1848, he and the complainant did agree to make sale of all and singular the said mills belonging to the partnership ; and that, in pursuance of said agreement, and with the concurrence of the complainant, the same were, with all and singular the machinery in the mills and a set of rollers belonging to the partnership and then being at

Newark, at the shop of Hewes & Phillips, machinists, and also all the material or unwrought stock and tools and certain other personal property then belonging to the partnership, on the 31st of August, 1848, struck off and sold at public vendue, to John J. Henderson, for \$8,500, he being the highest bidder therefor. That the complainant was present at said sale, took part therein, and assisted in fixing the terms or conditions thereof.

That, within the time in said conditions mentioned, he duly tendered to said Henderson a deed duly executed by him, this defendant, and his wife, for his share of said real estate and machinery in said mill; and that Henderson refused to receive the same.

He says he is informed and believes that the complainant, about the time of said sale and after the same had been agreed upon as aforesaid, stated that said Henderson would own the property in company with the complainant. And he has also been informed and believes that the complainant entered into an agreement with one David Burnet to lease to him, Burnet, after the said sale should have taken place, the saw mill in the bill mentioned. And the defendant says he is advised by his counsel and submits, that by the said sale of the said partnership property and effects the partnership was dissolved, and the business thereof at an end, except so far as regarded the collection of dues, the payment of debts, the sale of the residue of the stock, and the adjustment of the accounts of this defendant and the complainant in respect thereto, or the winding up of the affairs of the partnership.

He denies that he has ever, at any time, in any way prevented the complainant from participating in the partnership business, or ever in anywise excluded or attempted to exclude the complainant from participating in the transaction thereof, or refused to consult with him in relation to the partnership business, or refused to give the complainant any information of his, this defendant's, transaction of the partnership business or of his sales of the partnership property and collection of partnership debts. But, on the contrary, he says he has at all times during the continuance of the partnership, and subsequently to the dissolution thereof as aforesaid, been ready and willing to give to the com-

plainant all information he might require of this defendant concerning said partnership affairs, and to give the complainant a voice in all the partnership transactions and a full and equal participation with this defendant therein to all intents and purposes, and to communicate to the complainant any information he might desire concerning the partnership affairs and business, and of this defendant's conduct therein in every respect. - And he says that he never, except by the bill of complainant, so far as he can now recollect, was informed by the complainant that the complainant was, or at any time had been, dissatisfied with the conduct of this defendant about said partnership business and affairs.

He denies that he has taken the books of account and of the business transactions of the partnership from the paper mill, where, as the bill alleges, they belonged, to his own house, against the consent or remonstrance of the complainant; or that he refuses to bring said books back to the mill and to permit the complainant to have access to them.

He says that, from the commencement of the business of the partnership to about December, 1842, the said firm had but one book of partnership accounts or transactions; which book was, at the commencement of the partnership, kept in said pasteboard mill; and, there being no office in said mill, was then and for some time thereafter kept in different places in said mill, there being no fixed place for keeping it: but it was often to be found lying on bales of stock in said mill, or on heaps of unwrought material or of pasteboard. That, about six years ago, the complainant, in a conversation by him had with this defendant, referred to the loose and unsafe manner in which said book was kept in said mill, and suggested to this defendant that, lest it should accidentally be destroyed, this defendant should remove it to this defendant's dwelling house, about 200 yards distant from the mill, and keep it there; and this defendant did so, and kept it at his said house ever since, to this time, except when it has been brought forth as occasion required.

He says that, about December, 1842, another book of accounts and partnership transactions was commenced; and after that, another book was commenced; and that said three

books are all the books of account of the firm. That the last two books have never been kept in said mill, nor in any other place except this defendant's dwelling house ; and that the complainant has at all times had free access thereto, and has never, in anywise, to the knowledge of this defendant, been prevented from examining or using the same ; and that all the said books were placed in this defendant's dwelling-house with the complainant's full concurrence ; and that the complainant never requested this defendant to remove or suffer said books to be removed from said dwelling house to said mill, or to any other place, to be there kept, instead of at this defendant's dwelling house. He says that, on the 31st of March, 1848, he and the complainant did account with each other of and concerning their said partnership business theretofore transacted, and their respective transactions thereof and therein ; and, on a full, careful and accurate examination of their said accounts of the business and transactions of the partnership from the commencement thereof to that time, the same were adjusted to the satisfaction of this defendant and the complainant, the complainant then expressing his entire satisfaction therewith, the complainant was found indebted to this defendant in \$609.92 ; of which sum \$403 was due this defendant for moneys advanced beyond his share for building said mill, and interest thereon ; and the residue was due this defendant from the complainant on account of this defendant's share of the profits of the partnership business up to said March 31, 1848 ; for which sum of \$609.92 the complainant then gave his note to this defendant, of that date, payable one day after date ; which note is still in this defendant's possession, no payment either of principal or interest having been made. And the complainant then gave to this defendant, in a book kept by this defendant of moneys received and paid out by this defendant on account of the partnership, a written statement under the complainant's hand acknowledging that he had on that day settled all accounts on said book of this defendant and for the building of the mill, and that he, the complainant, then found a balance due this defendant of \$609.92, for which he, the complainant, had on that day given his note, at one day from that date, and that said settlement settled for all charges the com-

plainant then had against this defendant and said firm of Parkhurst & Muir. And the complainant at the same time, in the same book, gave this defendant another written statement under his hand to the effect that all the accounts in said book were settled up to said March 31, 1848, by the complainant's giving said note for \$609.92 to this defendant; and also another statement in writing, immediately following the last mentioned statement in said book, in the words and figures or of the tenor and to the effect following, that is to say: also all accounts up to this date, March 31, 1848; which statement was signed by this defendant and the complainant.

The defendant further says, that it was expressly agreed between him and the complainant, on the said 31st of March, 1848, that this defendant should thereafter take from the partnership business sufficient moneys to pay the said note; and that he has been informed and believes that the complainant has, since said settlement, declared that this defendant must take his pay for the said note out of the said partnership property.

He says that, since said Aug. 31, 1848, he has sent away and sold on his individual account from said mill the following goods of the property of the partnership: 2,252 pounds of trunk boards, which were sold to H. N. Peters, of Newark, on or about Sept. 16, 1848, on a credit of six months, at \$4.50 per hundred pounds; 2,307 pounds of hardware paper, worth at this time \$146, sent on or about Sept. 29, 1848, to John Campbell & Co., of Newark, to be sold on the account of this defendant; but whether the same has been sold or not this defendant does not know; and 547 pounds of trunk boards, sold on or about Oct. 5, 1848, to Cornelius Walsh, of Newark, on this defendant's account, for \$24.62; and that besides the above he has not sold or sent away to be sold from said mill, or any other place, any of the stock or goods belonging to the partnership. He says that all the said paper and pasteboard so sold and sent away to be sold on his account was duly, at the several times when the same was sold or sent away to be sold, charged by him against himself in the partnership books, at the full prices thereof; and that the said paper sent to Campbell & Co. to be sold was marked with

the letter M.; and said pasteboard was not marked in any way to designate from whom it came, or by whom it was sent. He says that, believing the partnership to have been dissolved by the sale of said partnership real estate and other partnership property, on said 31st of Aug. 1848, and the complainant having expressly agreed, as aforesaid, with this defendant, that this defendant should pay himself the amount of the said note of \$609.92 out of said partnership property, this defendant sold and sent away to be sold the said paper and pasteboard in good faith and intending to account for the same to the complainant in the final adjustment of their said partnership affairs.

That, since the said 31st of March, 1848, he has received of the moneys belonging to the partnership \$3,825.37, or thereabouts, and has paid out on account of said partnership \$3,515.56, or thereabouts, since that day, leaving \$308.81, or thereabout, excess of such receipts over such expenditures; a just and true account of which said receipts is annexed to this answer, marked Schedule A.; and a just and true account of said payments is also annexed to this his answer, marked Schedule B. That, in addition to said moneys mentioned in Schedule A., he received on account of the partnership business, on or about May 16, 1848, of the firm of C. & H. Lee, their due bill for \$29.12; on the 15th of Aug. 1848, of the firm of Leggett & Brothers, their note for \$250; which said due bill and note are yet unpaid and are now in his possession, no part of the money due thereon having at any time been received by him.

That the complainant's share of the net profits of the partnership business which have accrued since March 31, 1848, is not sufficient to pay the amount of principal and interest moneys due this defendant on said note of \$609.92.

He says it is true that, since said 31st of Aug. 1848, he has declared that the partnership has been dissolved; but has never so declared prior to that time. He denies that he ever said he had agreed with the complainant to carry on said partnership business on terms by which each partner was to use the mill on his own account and interest; but he says that he did, since said 31st of August, state, in effect, that he, this defendant, was going to run said mill for one month, and

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suffer the complainant to run it the succeeding month, and so on, each running the mill on his own account every alternate month. And he says that, shortly after he commenced to use the mill on his own account, he was informed that the complainant had said, in effect, that such an arrangement, whereby each partner should run the mill on his own account every alternate month, was well enough, except that this defendant should have suffered the complainant to have the use of the mill for the first month, and that the arrangement should have been that each partner should run the mill on his own account every alternate week.

He admits that he addressed two letters to the complainant; and that in the letter dated Sept. 19, 1848, he may, as in the bill alleged, have proposed to the complainant to continue the partnership for still another year; and that in the letter dated Oct. 12, 1848, he may have made the allegations in the bill mentioned; but he denies that he intended to convey in said last mentioned letter the idea that this defendant had never been in partnership with the complainant, or any similar meaning.

He says that the complainant and he have been in partnership in said business since 1839, and until Aug. 31, 1848, when, as he is advised by his counsel and submits, the partnership was dissolved by the sale of the partnership real estate and property hereinbefore mentioned and stated to have been made on that day. That no appeal has ever been made to him by the complainant, or on his behalf in any wise since said 31st of March, 1848, for any dissolution of the said partnership, or for a settlement of said partnership accounts; and he denies that he has ever refused in any way to come to a just and fair settlement with the complainant of the said partnership accounts; but, on the contrary, he says that he has ever since said settlement made between them on said 31st of March, 1848, been ready at all times to render an account of such portion of the partnership business as has been under his management and control. He says that after the refusal of said Henderson to take said deed for his part of the partnership property and real estate, he continued to carry on business in said mill on the partnership account, with the sole design of turning to the best advantage of

the partnership the unfinished material belonging to the partnership and then being in the mill. But finding, about the 4th of Oct., 1848, that the design of working up the said material was not likely to prove profitable to the partnership, on account of the nature of said stock or material, the same being very hard and not easily worked by the engines in the mill except when mixed with other and more pliable stock, and when not so mixed the same required three times as much work to convert it into pasteboard as when mixed with other stock as aforesaid; and not being willing to make purchases of other stock on the partnership account, said partnership then being, as he conceived and still conceives, dissolved, he purchased stock in his own name, and commenced the manufacturing thereof in said mill on his own account, as he is advised by his counsel he might properly do under the circumstances of the case.

That since the 4th October, 1848, he has used, for his own account, of the partnership property, 280 pounds of trunk boards that had been spoiled in the finishing, worth about 2 1-4 cents a pound, and which he believed could never be sold for the purpose for which they were made. That said 280 pounds of trunk boards were taken by him the day before the injunction in this case was served on him, and part thereof used on that day and part on the day of such service and prior thereto. That he intended to charge himself with it on the books of the partnership when he should have used it, but on account of the filing of complainant's bill has omitted to do so. That on the said 4th October, 1848, there remained in the mill twenty-one hundred, one quarter and fifteen pounds of unwrought material hereinbefore mentioned; and that he did then charge himself with the same on the books of the partnership, at the full value thereof, to wit, \$48.11, and has used about one-third thereof. That he is now, and has at all times since taking said pasteboard and stock or materials, been ready to account to the complainant for the same.

That, besides said 280 pounds of boards and said unwrought material so taken by him, he has in no wise mixed with his private stock, or used on his own account, any of the stock or material of the partnership. And that the complainant has

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never at any time expressed dissent to such use of said 280 pounds of boards and said stock or material, or either of them, or remonstrated in any way with him on account of such use thereof.

That he lately purchased for said paper mill a grindstone, of the weight of 682 pounds, and which cost \$6.82; that he paid for the same with his own private funds; and that, after it was so purchased and paid for, he, believing it to be necessary to the mill, and that it would, when placed therein, be for the equal benefit of himself and the complainant as tenants in common of the mill, charged it to said partnership on his own private book of receipts and expenditures on account of the partnership. And that, except said grindstone, he has lately purchased no machinery for said mill except one roller, bought by him about Oct. 12, 1848, in his own name and on his own account and credit. That he has lately made some slight and very necessary repairs to the machinery in the mill; and that the expense of such repairs, with the cost of the grindstone, will not exceed \$15, as he verily believes.

That, to replace a piece of the machine banding accidentally broken in the mill, he did, on or about Oct. 7, 1848, purchase another piece of banding on the account of the said Parkhurst & Muir, at a cost of \$3.27, which he has charged among the payments in said Schedule B. And that he is ready and willing to account to the complainant for all of said expenditures so made by him on account of said repairs to said machinery and for said grindstone and banding. And the complainant has never in any way remonstrated with him against such expenditure for repairs to said machinery or for said grindstone or banding; and that the complainant has never, himself or by his agents, spoken to him in any way on the subject thereof.

He denies that he has ever in any way boasted that he kept said books of said partnership in his possession and that the complainant knew nothing about the situation of the affairs of the partnership. He says he has never, as he verily believes, made any statement to the effect that the complainant was ignorant of the affairs of said business, whereby this defendant had any advantage of said complainant.

He says he has never conceived the design or had the inten-

tion of compelling the complainant to sell out to him the complainant's interest in said partnership property at a sacrifice, or through fraudulent means and by concealing from the complainant the true and exact situation of the partnership affairs to possess himself of all of said partnership property. But he says that, on the contrary, he has at all times been ready and willing to give the complainant a full statement of his acts and deeds in and about said partnership business; and he has kept a just, true and full account thereof in the books of the partnership and said book of said defendant kept by him as aforesaid and containing an account of his expenditures and receipts on account of said partnership business. And he has never conceived the design or intended in any way to act unjustly or unfairly towards the complainant in or about said partnership business or property. He denies that upon a settlement of the partnership accounts it would appear that any balance whatever is due from him to the complainant in respect of said partnership dealings; but says he verily believes that on a just and true account of said partnership dealings since March 31, 1848, when the said partnership accounts were settled as aforesaid, it would appear that he has not received from the partnership business sufficient, over and above his share thereof, to pay the said note of \$609.92, given by the complainant to him as aforesaid.

He says that, since said settlement on the 31st of March, 1848, the complainant has collected and received, in cash, divers sums of money belonging to the partnership, amount to \$145 or thereabouts; and did also, as he is informed and believes, receive, on or about Oct. 4, 1848, on account of moneys due the partnership from the firm of John Campbell & Co., the note of said firm, at six months, for \$100; and this defendant verily believes, that with the exception of \$5 paid by complainant to one Isaac Pryer, the complainant has applied said \$145, so collected and received by him, to his own individual use and benefit; and this defendant is ignorant what disposition the complainant may have made of the said note of \$100 received by him from Campbell & Co.

He denies that he has at any time in anywise prevented or

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endeavored to prevent the complainant from using the mill or occupying it in common with him, otherwise than as before set forth. He says it may be true that he has said he was working the mill on his own account and had been advised that he had a right to do so until he had been paid the amount due him from the complainant; yet he denies that he has ever, according to the best of his knowledge, recollection or belief, said that he was working the mill and collecting the debts of the partnership to pay the amount due him on said partnership account for his share thereof. But he submits that under the said agreement made between him and the complainant on said 31st of March, 1848, in reference to said promissory note of \$609.92, and under the circumstances herein before mentioned, he was fully at liberty to have worked said mill and to have collected said debts, for the purpose of realizing the amount of said note.

That it may be true that he has said that he had been advised to turn the complainant out of possession of said mill; but he denies that he ever said he intended to do so and did not mean to let complainant have anything to do with said business, or that he used words to that effect, or in anywise declarative of the intention to turn complainant out of said mill or not to permit complainant to have any participation in said partnership business.

He denies that he has declared, at any time since the commencement of the partnership up to this time, that he was never in partnership with the complainant, or has used words to that effect or of that tenor; and he says he has no recollection of ever having said that he had dissolved said partnership; and he verily believes he has never said so. But he admits that since said 31st August, 1848, he may have said that they, the complainant and this defendant, had dissolved said partnership, or used words to that effect; this defendant having reference to the dissolution by the sale of said partnership property and real estate.

He says that, since March 31, 1848, the complainant has spent but a very small part of his time in said mill and about the business of the partnership; and the time so spent by complainant would not in all, as this defendant believes, amount to more than 40 days. That, since said 31st of March, 1848, al-

most the whole burden of said business has rested on this defendant; as well the superintending of the mill as the making sale of the partnership goods; and that he has given to said business his whole and undivided time and attention. And he submits that on the taking of the accounts of the partnership business since said settlement thereof on said 31st of March, 1848, he is entitled to receive an extra allowance in consideration of such care, time and attention so given and bestowed by him since said settlement, taken in connection with the fact that the complainant has since then neglected the same and has not given the time and attention thereto which he ought to have done.

F. B. Chetwood and *Wm. Pennington* for the motion.

T. Runyon and *A. Whitehead*, contra. They cited 3 *Kent's Com.*, page 38, and sec. 328; 18 *Ves.* 280; 8 *Id.* 318.

THE CHANCELLOR. I see no ground for the appointment of a Receiver in this case.

Motion denied.

THOMAS W. HAYTHORN vs. STEPHEN F. MARGEREM.

In 1814, by agreement under seal, A. contracted to buy, and B. to sell to A. a tract of land ; and B. bound himself to give a deed to A. for it. A. paid the purchase money, and went into possession, and occupied it until 1825, when he moved from the vicinity; and, subsequently, C. took possession of the land. *Held*, that the fact that A. had not obtained a deed from B. was not a sufficient ground for applying to a Court of Equity to give him possession as against an intruder ; that his remedy was by ejectment.

By agreement under seal, B. agreed to sell to A. a tract of land which, the agreement said, B. had bought of C., and for which D., by agreement between him and C., was to make a deed to C.; and B. undertook to procure and make title to A. D. afterwards made a deed for the land to E. A. filed a bill against E. alone, praying that his title might be established, and for possession and an account of rents and profits. *Held*, that the representatives of D., who was dead, were necessary parties.

A party in possession may go into a Court of Equity under proper circumstances to remove a cloud from his title. But, it seems, that a party out of possession cannot, as against another in possession and claiming title under a deed, obtain a decree declaring the defendant's title void, and putting the complainant in possession.

On the 26th November, 1814, by an agreement of that date, under seal, between William and Robert Colfax, of the first part, and Thomas W. Haythorn, of the second part, the Colfaxes agreed to sell and convey to Haythorn the middle and south part of the farm they had lately bought of John Seward, situate in Vernon and Hardiston townships, in Sussex county, (describing it,) supposed to contain about 530 acres, including 20 acres near the turnpike house; for which, the agreement says, Jos. Sharp was to give a deed to said John Seward by agreement, and which agreement the Colfaxes were, by the agreement between them and Haythorn, to give over to Haythorn; the Colfaxes to have the farm surveyed as soon as convenient, and to make to Haythorn a good warrantee deed for the same, except a claim that Samuel S. Seward had on the farm, for about \$4,000; and also for the said 20 acres; the said claim of Samuel S. Seward to be taken out of the purchase money for the farm. And Haythorn agreed to pay the Colfaxes on the delivery of the deed, \$16 50 per acre, \$5,000 down, and the residue in four equal

annual payments, with interest, secured by bond and a mortgage on the premises.

In 1820, Samuel S. Seward obtained a decree of foreclosure on his mortgage, and for a sale of the mortgaged premises, (the claim of Samuel S. Seward, spoken of in the agreement, was a mortgage.) This mortgage did not cover all the lands agreed to be sold by the Colfaxes to Haythorn.

On the 11th of November, 1820, the mortgaged lands were sold by the Sheriff of Sussex under the said decree and a *fi. fa.* issued thereon.

In the September term, 1820, of the Supreme Court, the State Bank at Newark recovered a judgment against Haythorn as indorser for the Colfaxes, for \$1,781 53; and at the same term recovered a judgment against the Colfaxes for the same debt. On these judgments executions were issued and levied on the lands agreed to be sold by the Colfaxes to Haythorn which were not included in the mortgage to Samuel S. Seward, consisting of three lots; one called the Butler Seward lot, of about 39 acres; another, a lot of 20 67-100, lying at the south end of the farm; and the third, a lot of twenty acres near the turnpike house.

On the 3d of May, 1821, the Sheriff under the said executions, sold these three lots. Two of them were struck off to Nicholas Ryerson; and the third was struck off to the Bank.

The Sheriff, by deed dated August 13, 1821, acknowledged August 20, 1822, stating that Nicholas Ryerson, for and in behalf of William Smith, did then and there bid for a certain lot, commonly called the Butler lot, \$136; and also the said Nicholas Ryerson, for the use of said William Smith, did then and there bid the sum of \$100 for another lot of land, commonly called the turupike lot, situate on each side of the turnpike, as is supposed, and that no person bid more, conveyed the said lots to William Smith. This deed was made on the sale under the execution of the Bank against Haythorn.

And the Sheriff, by another deed, dated August 13, 1821, acknowledged August 20, 1822, stating that Nicholas Ryerson, for and in behalf of William Smith, did then and there bid for a certain lot of land said to contain 24 acres commonly

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known by the name of the Butler lot, the sum of one dollar, and the said Nicholas Ryerson, for the use of said William Smith, did also then and there bid for another lot said to contain 24 acres, being known by the name of the turnpike lot, the sum of one dollar, and that no person bidding more, conveyed the said lots to Wm. Smith. This deed was made on the sale under the execution of the Bank against the Colfaxes.

No deed was ever made by the Sheriff to the Bank for the lot struck off to the Bank at this sale.

After the sale of the mortgaged lands, Haythorn remained in the Mansion House on the farm.

In July, 1825, Haythorn left the county of Sussex, and moved to Paterson, where he has ever since resided.

On the 25th of October, 1842, Haythorn filed his bill, stating the foregoing facts; and stating, that on the execution of the agreement between him and the Colfaxes, for the sale by them and the purchase by him of the lands mentioned in that agreement, he paid a large part of the purchase money to the Colfaxes, and, in pursuance of said agreement, entered and took possession of all the lands therein mentioned, and continued in possession, making improvements, and making payments, until about 1819, when he had entirely satisfied the Colfaxes all the money to be paid to them; and that they offered him a deed for the premises; but that, because they had not procured a title from Sharp for the 20-acre lot near the turnpike house, he declined taking the deed till that was done; and that the delivery of the deed from the Colfaxes to him was for this cause delayed from time to time, so that he has never received a title from them. That he made payments from time to time on the mortgage to Samuel S. Seward, until 1819, when S. S. Seward filed his foreclosure bill.

He says that, after the Sheriff's sale of the mortgaged land to Ryerson, and on the 28th of November, 1820, Ryerson, at the request of the complainant, Haythorn and by an arrangement and agreement between the complainant and Smith, for \$300, assigned all his right and interest in his bid for the mortgaged premises to Smith, and thereby directed the Sheriff to convey said mortgaged lands to Smith; and that the Sheriff, in

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pursuance thereof, on the 29th of November, 1820, by deed of that date, conveyed the said mortgaged lands to Smith.

That it was agreed between the complainant and Smith, that the complainant might become joint owner of the lands so conveyed to Smith by paying half the purchase money; and that they would carry on business on the said lands together. That, in pursuance thereof, the complainant and Smith built and put in operation together, on said mortgaged premises, a forge and saw mill. That Smith resided in New York. That the complainant had the possession of the said premises, and controlled and managed the business thereon. That he remained so in possession of said premises until July, 1825, when, he and Smith having had difficulties respecting said agreement to purchase the said lands sold under the mortgage, and respecting the business carried on by them on the same, and having submitted those difficulties to arbitration, the complainant gave up the possession of said mortgaged lands to Smith, and moved to Paterson.

As to the lots not included in the mortgage, he states, that he remained in the quiet and peaceable possession of them from the time he purchased them, with the mortgaged property, from the Colfaxes, until he moved to Paterson.

He states, that at the sale of these lots under the judgment of the Bank against him, Mr. Vanderpool and Mr. Bolles attended the sales as agents of the Bank, and that Nicholas Ryerson attended there as his agent and friend. That Ryerson remonstrated against the sale of the complainant's lands, insisting that it was wrong to sell the complainant's lands while the Colfaxes had lands and means of paying the claim. That it was then agreed between the agents of the Bank and the complainant that the Sheriff should sell the complainant's said tract of lands, by virtue of said judgment and execution against him, upon the condition and the express understanding that the Sheriff should delay to make a deed, and that if the claim of the Bank was paid and satisfied in a short time by the Colfaxes or the complainant, the sale was to be void and of no effect. That the Sheriff then, in pursuance of the said understanding and agreement, put up the said lots for sale by virtue of the execution against the complainant, and that said N. Ryerson, at the in-

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stance and as the friend and agent of the complainant, bid in two of said lots, the Butler Seward lot, and the lot at the south end of the farm. (The deed from the Sheriff to Smith, above stated, for two lots conveys the Butler lot and the turnpike lot.) That at the same time, and under the same arrangement and understanding, by virtue of the execution of the Bank against the Colfaxes, the Sheriff sold the right and interest of the Colfaxes, if any, in the said two lots, to the said Ryerson, for the nominal sum of \$1 for each lot.

That on the sale under the execution against the complainant the said Vanderpool bid off the other lot.

That afterwards, in June then next, the Colfaxes and the complainant paid the entire claim of the Bank; it being paid mostly by the surplus money arising from the sale of said mortgaged premises, the amount of that sale being more than the mortgage debt. That neither Ryerson nor Vanderpool ever paid anything on account of the lots so bid off by them, respectively, or obtained any deed, or directed any deed to be made to any other person.

That Smith, learning that the complainant's said lots had been sold by the Sheriff, applied to and procured from the Sheriff, without the knowledge or consent of Ryerson or the complainant, deeds for the said two lots so bid off by Ryerson. That Smith represented to the Sheriff, as the complainant is informed and believes, that Ryerson bid off the said lots for him, Smith, and as his agent; and that Ryerson was willing, and had directed him to obtain deeds for the said lots; and that the Sheriff, not knowing that the claim of the Bank was satisfied, was induced to and did receive the amount of the bids from Smith, and deliver to him deeds for the said two lots, upon the condition and understanding, as the complainant was informed, that the Sheriff would hold the money therefor, and if the delivery of the deeds to Smith should prove to be wrong, they should be returned and the money refunded; and that the money remained in the hands of the Sheriff until and at the time of his death, in about 1830. The bill then states the death of Smith, in 1826; and the sale of his real estate by commissioners, on the 3d of April, 1827;

and that the defendant Margerem became the purchaser, and received from the commissioners a deed which included the said two lots of the complainant.

The Margerem, in 1827, besides taking possession of the lands which belonged to Smith, in his lifetime, also entered upon and took possession, unlawfully, of the complainant's said three tracts before mentioned.

That, as soon as the complainant was informed of such entry and intrusion, he went to Margerem and remonstrated with him ; that Margerem said he would make inquiry, and that if said lots belonged to the complainant he would buy them of the complainant ; and that he, Margerem, would investigate the matter ; that the matter was delayed from time to time, at the request of Margerem, until about three years had elapsed, when the complainant insisted on knowing what he intended to do, and Margerem then stated that he thought the complainant had no right to the said lots, and refused to give them up to the complainant. That, as soon after as he could command funds to do so, he employed Thos. C. Ryerson, since deceased, as his counsel to aid him in the recovery of the said lots. That said T. C. Ryerson was shortly after appointed a Justice of the Supreme Court ; that he then employed other counsel, and was about to commence a suit for the recovery of his said lots, when Margerem expressed his willingness to submit the matter to arbitration, and wished the complainant to defer suit until he, Margerem, could confer with his counsel in respect to submitting the matter to arbitration ; and the complainant did so. That Margerem, after thus prolonging the matter, finally refused to submit it to arbitrators. That Margerem has been in possession of all said lots from 1827 to this time.

The bill prays that Margerem may be decreed to deliver possession to the complainant, and to account for the rents and profits ; and that the deed from the Sheriff to Smith for the said two lots bid off by Ryerson may be declared void ; and that the complainant's right and title to the said lots may be established ; and for such further and other relief, &c.

The defendant, in his answer, admits, that the complainant,

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for some time previous to 1820, was in possession of a farm and tract of land situate in Vernon and Hardiston, as set forth in the bill; but of how much land, or by what title, agreement or authority, he does not know; nor has he any knowledge of any such article of agreement between the Colfaxes and the complainant; nor of the existence of any articles of agreement between Joseph Sharp and John Seward for the sale and conveyance of the said 20 acre turnpike house lot.

He says he is informed and believes that the Sheriff, by virtue of a decree and execution in the foreclosure suit of Samuel S. Seward, sold the mortgaged premises, on the 11th November, 1820; and that Nicholas Ryerson then bid for and became the purchaser of the same, for \$5,610. And he is informed and believes that Ryerson, in so bidding and becoming the purchaser of the mortgaged premises, was not acting as the agent or on account and behalf of the complainant, but for the benefit and on behalf of himself and said Wm. Smith.

He admits that Ryerson, on the 28th of November, 1820, assigned to said Smith all the right and interest he had acquired in said mortgaged premises by his said bid and purchase, for \$300, and that the Sheriff, by deed dated November 29, 1820, conveyed the said mortgaged premises to Smith.

He says he has no knowledge or belief that the complainant was to become a joint owner with Smith in the purchase of said mortgaged premises; but says he is informed and believes that, about the time or soon after the said mortgaged premises were conveyed to Smith, Smith took possession thereof, except the principal dwelling house and three lots of land adjacent thereto, containing together about 50 acres, which, by his permission, the complainant retained and occupied as tenant to Smith, until Smith, on the 22d of February, 1825, recovered a judgment in ejectment against the complainant; and afterwards, on or about July 13, 1825, the Sheriff dispossessed the complainant, and delivered the possession of the said three lots to Smith. He says he is informed and believes that Smith, when he purchased said mortgaged premises and afterwards, lived in New York; but that his servants, agents and tenants occupied the

said mortgage premises, except the said three lots retained by the complainant.

He speaks of the reference in the suit of Haythorn v. Smith's administrator ; and says that all matters in difference between Haythorn and Smith were referred ; and that no claim to any interest in the mortgaged premises was set up by the complainant.

He admits that the Butler Seward lot, of about 29 acres, and not 39 as stated in the bill, and the lot of 25 8-100 acres on the south end of the farm, and the 20 acre lot near the turnpike house, were not included in the mortgage to S. S. Seward, and were not conveyed by virtue of said decree and execution to Smith.

He admits that the complainant left the premises and moved to Paterson about July 12, 1825.

He admits the sale by the Sheriff under the judgments and executions of the Bank against the complainant and the Colfaxes, respectively, of all the right, title and interest of the complainant and of the Colfaxes in the said Butler Seward lot and the said lot at the south end of the farm, containing, after deducting 4 41-100 acres, sold by the complainant to George Kanouse, 20 67-100 acres ; and that at that sale N. Ryerson bid for and became the purchaser of the said two lots ; but he denies that N. Ryerson bid for and purchased the same for or on behalf of the complainant ; but says he is informed and believes, and therefore states, that said Ryerson was then acting as the agent and on behalf of said Smith.

He says he has no personal knowledge that there was any agreement or understanding that the said sale was upon any condition respecting the payment of the money due the Bank, and never heard of any such condition until the complainant mentioned the same to him, as in the answer afterwards stated.

He then states that the Sheriff delivered to Smith deeds of all the complainant's right, title and interest, and of all the Colfaxes' right, title and interest in the said two lots ; and that the Sheriff, in both said deeds, has recited that said N. Ryerson bid for and purchased the said property for and on behalf of and to the use of said Smith.

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He admits that Smith died in 1826; and that, on the 3d of April, 1827, the commissioners appointed to divide his real estate offered for sale the said Seward farm, together with several tracts adjoining the same, whereof Smith had died seized and possessed, a map whereof was then and there exhibited, showing the metes and bounds of all the said tracts or parcels of land so by them offered for sale.

He says that, relying on the information derived from the inspection of said map and from several of Smith's heirs who were familiar with his lands and knew what he had possessed in his lifetime, and also on the information of the said commissioners, he was induced to and did bid for and become the purchaser of said farm and tract of land, for \$5,100, by him afterwards paid to the commissioners; and the commissioners, by their deed dated August 1, 1827, conveyed to him the said lands and premises; and therein and thereby, among other tracts of land, conveyed the said Butler Seward lot, and the said lot of 25 8-100 acres, including the 4 41-100 acres sold by Haythorn to Kanouse thereout, and which 4 41-100 acres Kanouse afterwards sold to Smith.

That, soon after the said commissioners' sale to him, to wit, on or about the first part of May, 1827, as he was then informed and has since been informed and believes, took possession of all the lands described in said map and the said commissioners' deed, and which said Smith had occupied in his lifetime and up to the time of his death; and says he has ever since been in the quiet and peaceable possession of said lands and premises.

That the 20 acre lot near the turnpike house was never, as he is informed and believes, in the possession of Smith; and this defendant never had or took possession of it until or about April 29, 1842, when Joseph Sharp sold and conveyed it to him for \$145.

That the complainant, in all the claims made against him, and in all the various conversations on the subject of those lands, as in the answer afterwards stated, never mentioned to him any claim or demand against him for the said turnpike house lot; and that the first information he had of any such claim was from the bill; and that he is informed and believes that Sharp was and is

under no obligation whatever, in law or in equity, to convey said lot to the complainant.

He admits that the complainant spoke to him and made claim to the other lots, that is to say, the Butler Seward lot and the lot at the south end of the farm; but never to his knowledge, recollection or belief, till some time in 1837.

He says he was greatly surprised at the said claim, and thereupon told the complainant that he supposed he had a good title to all the lands he possessed: that he had bought upon the representations of the heirs of Smith and of the said commissioners; but had never examined the titles, nor had them examined expressly for himself; but that he would do so: and if he found that the complainant had any right to any part of said lands, he would cheerfully give it up to him or pay him the value of it.

That he is informed and believes that his counsel examined his titles to the said three lots; and when he, the defendant, next saw the complainant he told the complainant he had not been able to discover that the complainant had any title to the said lots or either of them. That the complainant then stated to him that the said deeds from the Sheriff to Smith for two of the lots were fraudulent and void for the reason stated in the bill. That he, the defendant, then said he would also examine into that; and, of course, he had to take time for that purpose. That he thereupon did inquire and examine into the same; and could get no information that induced him to believe the said deeds fraudulent. And as soon as he could, with all reasonable diligence, satisfy himself on the subject, he told the complainant of the result of his inquiry, and that he was not willing to give up the said lands. And he says he has made no unnecessary delay in the matter. He denies that he has ever expressed any willingness to submit the said matters to arbitrators; but he always declined such submission, stating that he had bought the property for a full and valuable consideration without the knowledge or suspicion of any defect of title to any part of it. But he admits that, on one occasion, on his being urged by the complainant to submit the matters to arbitrators, he told complainant he would leave it to his counsel to direct him what to do. And

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upon being advised not to do it, he took the earliest opportunity of informing the complainant of the advice he had received. He denies that the complainant ever offered to sell him the said lands, or to come under any agreement respecting the same; but, on the contrary, he says that, being willing to quiet all claims to his land and to buy his peace at a reasonable price, he has frequently asked the complainant what value he set upon his said claims, and how much he would take for the said lands whether he had any right to them or not; but the complainant never would make him any direct answer to such inquiries.

He says he is informed and believes that, while the complainant was in possession of the 50 acres as tenant to Smith, and when Smith was desirous of getting possession thereof, he, Smith, offered the complainant to convey to him 200 acres in Oswego county, New York, and a yoke of oxen and a wagon, if he would quit all the said premises and give up the possession of and all claims to the same to Smith; but that the complainant hesitated about accepting said proposition, and delayed giving an answer until Smith brought his said ejectment.

He says he is informed and believes, that the said ejectment was set down for trial in November term, 1824, and that the complainant relinquished his plea, and judgment was entered against him at the February term, 1825, of the Supreme Court. That, after the complainant had relinquished his plea, Smith, through the importunity of Mr. Frelinghuysen, Haythorn's counsel in that suit, and as a mere gratuity to the said Haythorn, and in consideration of his misfortunes, entered into an agreement with him as follows: "I, William Smith, of New York, for and in consideration of one dollar, and other good considerations to me paid by Thomas W. Haythorn, of Sussex, do covenant, grant and agree to and with the said Thomas, to grant, bargain and convey to him in fee simple, by good and sufficient deed, 200 acres of land to be selected by said Thomas from and out of a tract of land owned by said William Smith in the Scriba patent, (&c.), excepting from the said right of selection lots 68 and 74, the said 200 acres to be selected in a body; and the said William agrees to execute said deed as soon as the said Thomas shall notify him of the selection. And the said

William further agrees to deliver a yoke of oxen, a yoke and chain and a two-horse wagon, in thirty days from date, to the said Thomas.

Nov. 28, 1824.

WM. SMITH."

Witness, JOB S. HALSTED.

And delivered the said agreement to the said complainant.

He says he is informed and believes that, about the time of the making of said agreement, and afterwards, the complainant declared to divers persons that Smith was a friend to him, and, notwithstanding all their differences, had agreed to provide well for him by giving him a good farm in the State of New York; that he had given up all the property here, and was going to the land Smith had given him.

He says he is informed and believes, that the complainant, after Smith's death, brought his action against Smith's administrator, to the term of August, 1828, of the C. P. of Sussex; and that the matters in controversy in said suit, and all other matters in dispute between the said parties, were by rule of said Court, made at May term, 1830, referred to referees; who made their report at the term of August, 1830, and thereby reported that they found due the complainant \$127,84 damages besides costs, and that judgment was entered for the complainant for the said sum. And he says he is informed and believes, that the complainant, among other things, upon the said reference demanded \$1,500 for damages he alleged he had sustained by reason of Smith's not having conveyed to him the said lands in Oswego county, New York; but that the said claim was not allowed, as Haythorn had never made any selection of land. But this defendant is informed and believes, that said land was afterwards conveyed to Haythorn by or on behalf of the heirs of said Smith.

He says he is informed and believes that, during the progress of said suit and reference, Haythorn made no claim to the said tracts now claimed by him of this defendant, or either of them, nor to any damage or charge for the use or occupancy thereof by Smith or his hands. And the defendant submits, whether any claim which the complainant may possibly have to the said tracts of land now claimed by him is now barred by the statute of limitations, inas-

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much as he, the defendant, and those under whom he claims have been in the peaceable and quiet possession of the same for more than 20 years next before the commencement of this suit. And he prays the benefit of the statute as fully as if he had pleaded it.

Testimony was taken on both sides; and the cause was heard on the pleadings and proofs.

R. Hamilton and F. T. Frelinghuysen for the complainant. They cited 2 *Story's Eq.*, sec. 769, 770, 1; 1 *Ib.*, sec. 175; 2 *John. Ch.* 585.

D. Haines and P. D. Vroom for defendant. They cited 7 *Halst. Rep.* 336; 2 *Green's Rep.* 567; 8 *Wheat.* 326, 336, 7; 8 *John. Rep.* 137; 3 *John. Ch.* 147, 377; 8 *Cranch*, 462; *Den. v. Hunt*, 1 *Spencer's Rep.*; 2 *Sugd. on Vendors*, 427.

THE CHANCELLOR. The agreement of sale and purchase between the Colfaxes and Haythorn included three lots which were not covered by the mortgage to Samuel S. Seward, namely, the Butler Seward lot, the lot at the south end of the farm, and the turnpike house lot.

Haythorn went into possession of these, as well as of the part mortgaged to Samuel S. Seward, in 1814, under the said agreement of sale and purchase between the Colfaxes and him.

In November, 1820, the lands mortgaged to Samuel S. Seward were sold, under a decree and execution for the sale thereof, to satisfy Seward's mortgage; and the title to these mortgaged premises became subsequently vested in Smith.

In May, 1821, the said three lots not included in the mortgage were exposed to sale by the Sheriff, on judgments and executions in favor of the State Bank at Newark against Haythorn and the Colfaxes; and two of them, viz., the Butler Seward lot and the turnpike lot, were struck off to Nicholas Ryerson; and the third was struck off to the Bank. No deed was ever made to the Bank for the lot struck off to them; nor was any deed ever made to Ryerson for the lots struck off to him.

The debt due the Bank, and for the payment of which these three lots were so exposed to sale and struck off, was afterwards paid by Haythorn and the Colfaxes; the judgments were obtained on notes of the Colfaxes on which Haythorn was indorser. Nothing was ever paid by Ryerson or the Bank for or on account of the lots so struck off to them, respectively.

In August, 1821, Smith obtained from the Sheriff deeds for the two lots so struck off to Ryerson, and paid to the Sheriff the sums for which the said two lots were, respectively, struck off. That money remained in the hands of the Sheriff until and at the time of his death; and is still in the hands of his representatives.

Afterwards, the commissioners appointed to divide the estate of Smith after his death sold all his real estate to Margerem, the defendant, at public sale; and included in said sale the Butler Seward lot and the turnpike lot, for which Smith had so obtained deeds from the Sheriff.

As to the lot at the south end of the farm, then, the case is simply this: Haythorn went into possession of it under a written agreement under seal for the purchase of it from the Colfaxes, and paid the purchase money, and remained in actual possession of it until he removed to Paterson, in 1825; and neither Smith nor Margerem ever acquired any title or pretense of title to it. Neither Smith nor Margerem has ever had anything to oppose to Haythorn's right to the possession of this lot, except a possession, if they had possession, without any title or right of possession. Haythorn's prior possession was at all times sufficient for his recovery of the possession of it from them or either of them by ejectment. And he had not only the prior possession, but that was accompanied with the right of possession, under the said agreement between the Colfaxes and him. I do not see that the fact that Haythorn had not obtained a deed from the Colfaxes of the legal title and that in that view his title was only an equitable title is any reason why this Court should be applied to to give him possession as against an intruder upon his possession. It would have been proper for him to come here to obtain the legal title from the Colfaxes; but that is not the object of this bill; the Colfaxes are not parties to the bill. The

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prayer of the bill is for possession as against Margerem. His remedy was by ejectment. As to the turnpike lot, the defendant says he is informed and believes it was never in the possession of Smith; and that he, the defendant, never held or took possession of it until April, 1842, when Jos. Sharp sold and conveyed it to him. If, then, Haythorn is entitled to the possession of this lot as against the defendant, he has a plain remedy by ejectment.

If, by reason of the state of things between Jos. Sharp and John Seward, (whose interest in or claim to a title for said turnpike lot, from Sharp, is said to have passed from said John Seward to the Colfaxes, and from the Colfaxes to Haythorn,) Sharp was under no obligation to make a title for said lot to John Seward, or to any one claiming his interest, but was at liberty to convey it to whom he pleased, then his grantee cannot be disturbed in the possession of it. As to this lot the remedy of Haythorn is either by ejectment against Margerem, if, under the circumstances, that shall be deemed the proper remedy, or by bill against Sharp for a conveyance or compensation, making all necessary parties defendants. I do not see how this Court can take any action in reference to this lot on a bill against Margerem alone. The question between Sharp and John Seward, or the assignees of his interest, cannot be settled on a bill to which Sharp's representatives are not parties. There seems to have been a misapprehension on the part of the complainant as to the two lots struck off to Ryerson on the sale under the Bank judgment and execution. The bill states that at that sale the Butler Seward lot and the lot at the south end of the farm were struck off to Ryerson; and the answer admits this; but the Sheriff's deeds to Smith for the two lots struck off to Ryerson at that sale show that they were the Butler Seward lot and the turnpike lot, and not the lot at the south end of the farm; and Margerem, at the commissioners' sale of Smith's lands, bought the lots which had been so deeded by the Sheriff to Smith. But the defendant, in his answer, says he is informed and believes that Smith never had possession of this lot, and that he, the defendant, never took possession of it until 1842, when he took possession of it under a deed from Sharp to him; and

this is the title under which the defendant claims to hold this lot. Now, Sharp may or may not have been bound to convey this lot to John Seward, or the assignees of his interest in it. It is clear that the Court cannot on this bill, to which Sharp's representatives are not parties, give Haythorn any relief as to this lot.

As to the Butler Seward lot, the case seems to be this: It was not included in the mortgage to Samuel S. Seward. In May, 1821, it was struck off to Ryerson at the Sheriff's sale under the Bank execution. On the 20th of August, 1821, the Sheriff made a deed for it to Smith. On the 23d of November, 1824, Smith recovered a verdict in ejectment against Haythorn for that part of the premises mortgaged to Samuel S. Seward of which Haythorn then remained in possession. On that day Smith gave to Haythorn a writing by which, in consideration of \$1 and other good considerations, he covenated, granted and agreed with Haythorn to convey to him in fee 200 acres of land in the Scriba patent, Oswego county, New York, to be selected in a body by the said Haythorn, and to execute the deed as soon as the said Haythorn should notify him of the selection; and Smith, by the said writing, further agreed to deliver to Haythorn a yoke of oxen, ox yoke and chain, and a two-horse wagon, in 30 days from the date of said writing. These latter articles appear to have been delivered to Haythorn shortly after. Judgment in the ejectment was entered at the term of the Supreme Court succeeding the verdict; and in July, 1825, Haythorn was dispossessed of the premises for which the ejectment was brought; and thereupon moved to Paterson. This Butler Seward lot, though not included in the mortgage to Samuel S. Seward, lay within the enclosure of the farm.

In 1826, William Smith died. Commissioners were appointed to make partition of his lands; and on a report that the lands could not be divided without prejudice, the commissioners were ordered to sell them at public sale. The defendant, Margerem, was the purchaser at this sale. This Butler Seward lot was included in this sale; and the commissioners executed to Margerem a deed for the land so sold by them, including the Butler Seward lot, on the 1st of August, 1827, and Margerem thereupon went into possession.

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Previous to May, 1830, Haythorn sued the administrators of William Smith, in the Common Pleas of Sussex, in an action on the case, for work and labor, &c. In the term of May, 1830, of that Court, it was ordered by the Court, with the consent of the parties, that all matters in dispute and difference between the parties be referred to the award, order, arbitrament, final end and determination of Jos. E. Edsall, Robert A. Lum and David Ford. On the 16th of August, 1830, the referees reported that they found due to Haythorn, from the administrator of Smith \$129 84, with costs; and further reported, that as respects a certain article of agreement for the conveyance of 200 acres of land by Wm. Smith to Haythorn, made Nov. 23, 1824, they took the matter contained in the said articles into consideration, and were not influenced in making out their report by anything contained in that article; and that they could not allow to Haythorn his claim for damages for the neglect of said Smith to execute the conveyance for the said land; Haythorn, having failed or neglected to make his selection and notify Smith thereof. On the 5th of May, 1835, Thomas C. Ryerson, as late Attorney of Thomas W. Haythorn, in a controversy between him and the Administrators of Smith, deceased, gave a writing by which he acknowledged to have received from Elias L'Hommedieu, in behalf of the said Administrators of Smith, a deed for 161 1-4 acres of land in Oswego county, New York, executed to said Haythorn, and also \$47 41 in money; which deed, he in pursuance of instructions from the said Haythorn, accepted for him in full satisfaction and fulfilment of a written promise made by said Smith in his lifetime to the said Haythorn, for the conveyance of two hundred acres of land in the State of New York. Matters stood in this situation until the filing of the bill in this cause, on the 25th of October, 1842; the defendant, Margerem, having been in possession of the Butler Seward lot, under his deed from the said commissioners since August 1827, a period of 15 years, and Smith in his lifetime having been in possession of this Butler Seward lot from July 1825, when Haythorn removed to Paterson till his death, claiming title thereto under his deed from the Sheriff in August 1821; and as to the possession

of this lot between Aug. 1821 and July 1825, the evidence of an exclusive possession by Haythorn is not very satisfactory.

Here, then, is a period of at least 17 years, during which Margerem, and Smith, under whom he claims, have been in exclusive possession of this lot prior to the filing of the bill, claiming title under deeds. This would not be conclusive against Haythorn's report either at law or in this Court; but it shews a staleness in the present claim, which added to the facts before stated, should admonish the Court not to venture on any doubtful ground or ahead of jurisdiction, or any exercise of a jurisdiction properly belonging to a Court of law, for the purpose of giving the Complainant relief in this Court.

The ground on which the Complainant comes here seems to be that his title is only an equitable title, he never having obtained a deed from the Colfaxes, and that the deed from the Sheriff to Smith for this lot, struck off to Ryerson at the Sheriff's sale on the Bank execution, was improperly obtained by Smith from the Sheriff, and was illegally given by the Sheriff to Smith; that it was agreed, at and before the persons this sale, between there representing the bank and Haythorn and the Sheriff, that the deed should not be delivered, but that time should be given, notwithstanding the striking off the lots at the sale, for the payment of the bank judgment; and that if it was paid within some short time no deed should be executed by the Sheriff; that the bank judgment was paid before the Sheriff made the deed to Smith; and therefore the Sheriff had no right or authority to make a deed, even to Ryerson, the person to whom this lot was struck off; much less to Smith; and that the deed was procured by Smith from the Sheriff by misrepresentations made by him to the Sheriff, and was therefore fraudulent and void.

And the complainant comes into this court praying that Margerem, to whom this lot, with other lands, was conveyed by the commissioners who sold Smith's real estate, may be decreed to deliver possession of this lot to the complainant; and to account for the rents and profits of it; and that the deed from the Sheriff to Smith therefor may be declared void, and that the complainant's right to the said lot may be established.

If the complainant was in possession, it may be that a bill

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would be entertained in this court for the purpose of setting aside a deed obtained under such circumstances as those under which Smith obtained a deed from the Sheriff for this lot. A party in possession may come into this court under proper circumstances to remove a cloud from his title. But I am not aware that a party out of possession can come here as against another in possession, and claiming title under a deed, and obtain a decree declaring the defendant's deed void and putting the complainant in possession and giving him an account of the rents and profits. If the deed from the Sheriff to Smith was void, it was void at law as well as in equity; and the complainant's prior possession and right of possession under the agreement between the Colfaxes and him was sufficient for him to maintain ejectment against Smith. And, in ejectment against Margerem, the questions, whether the case was within the principle that a *bona fide* purchaser from a fraudulent grantee will hold unaffected by the fraud, and whether Margerem was such a *bona fide* purchaser, were questions as proper for a court of law as for this court.

This court could not grant the relief sought by this bill without declaring that the title set up by Margerem is bad, and that the complainant is entitled to the possession of the lands against that title. This, I conceive, would be going beyond the province of this court.

Smith had a deed for this lot from the Sheriff, and came into possession of it at least as early as July, 1825, when Haythorn moved to Paterson; and he died in possession, in 1826. Margerem bought it at the commissioners' sale of Smith's estate; and has been in possession ever since. If there were any equities in the case proper to be settled by this court, after a trial at law, this court might retain the bill until the question of title should be settled at law. But an ejectment, with the action for mesne profits, if judgment should be recovered in the ejectment, would afford full relief. There would be nothing left for the action of this court. If the time which has elapsed would now be a difficulty in the way of the complainant, at law, that difficulty cannot affect the determination of this court as to the propriety of its granting the relief sought by this bill.

Bill dismissed.

SAMUEL H. PENNINGTON vs. ELIAS L'HOMMEDIEU and SAMUEL FOWLER, Executor of SAMUEL FOWLER, deceased.

To a bill by a daughter, against the Executors of her father's will, for her share of the residue of the personal estate by the will to be divided among the children, the Executors set up a release executed by her and her husband of all their interest in the estate for \$700. No inventory of the personal estate had been made by the Executors; and the shares afterwards proved to be \$4,500 each.

Held, that the release was no bar.

No higher duty rests on this Court than that of insisting on a plain, direct and faithful performance of the trust reposed in Executors.

A father, without taking out letters of guardianship, acted as the guardian of the estate of his daughter, received moneys expressly in that character, and receipted for them in that character.

Held, that lapse of time in analogy to the statute of limitations was no defense.

The bill in this case, filed Sept. 20, 1845, is exhibited by Samuel H. Pennington, against Elias L'Hommedieu and Samuel Fowler; and states that Samuel Fowler, late of the County of Sussex, deceased, left a will, dated Dec. 4, 1842, and appointed his sons Samuel Fowler, (one of the defendants,) Henry O. Fowler, Robert O. Fowler and John Fowler, together with Elias L'Hommedieu, (the other defendant,) and Daniel Haines Executors thereof. That the said testator died on or about Feb. 26, 1844; and that L'Hommedieu and Samuel Fowler, (the defendants,) two of the Executors named in the said will, proved the same and took upon themselves the burden, &c., and possessed themselves of all the personal estate of the testator, to a very large amount. That on the death of Jacob S. Thompson, who was an uncle of Julia Ann Bigelow, and who died about the 1st of Jan., 1832, intestate, the said Julia Ann Bigelow, as one of the heirs at law of the said Jacob S. Thompson, deceased, became entitled in fee, as tenant in common with divers other persons, heirs at law of said intestate, to a large and valuable real estate, situate in the County of Warren. That the share of the said Julia Ann was the one equal undivided fifth part, and was divided and set off to her

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in severalty on or about March 1st, 1832. And that the said Julia Ann, as one of the next of kin of the said Jacob S. Thompson, deceased, became entitled to a distributive share of the personal estate of said intestate; her distributive share being one fifth. That during the minority of the said Julia Ann, and at or about the time of the death of the said Jacob S. Thompson, the said Samuel Fowler, deceased, was appointed and became the Guardian of the estate, real and personal, of the said Julia Ann; and as such took possession, charge and custody of the real estate of the said Julia Ann; and from time to time received large sums of money of the personal estate of the said Julia Ann. That, in particular, the said Samuel Fowler, deceased, received from Jacob T. Sharp, the Administrator in Pennsylvania of the said J. S. Thompson, deceased, on or about the 8th of Feb., 1833, \$1315. And that the said Samuel Fowler, deceased, gave to the said Sharp a receipt for the same as follows: "Received, Eeb. 8th, 1833, of Jacob T. Sharp, Administrator of the estate of Jacob Thompson, deceased, in Pennsylvania, \$1315, for the use of Julia Ann Fowler, my daughter and ward, one of the heirs of said estate," and signed "Samuel Fowler, Guardian of Julia Ann Fowler."

That, in particular, the said Samuel Fowler, deceased, leased a large and valuable part of the said real estate of said Julia Ann to one Mark Thompson, from on or about the time of the death of the said Jacob S. Thompson until on or about April 1st, 1834, and received from time to time the rent reserved for the same, amounting in all to about \$500, or a large part of the same; and that the said Samuel Fowler, deceased, leased several other large and valuable parts of the said real estate of the said Julia Ann to divers persons, and received from time to time the rent reserved for the same, or some part thereof, amounting to a large sum of money; and used and occupied divers other large and valuable parts of the real estate of the said Julia Ann, and derived great gains therefrom for his own use and benefit.

That if said Samuel Fowler, deceased, failed to collect any part of the rents so reserved, such failure was owing entirely

to and resulted from his neglect and inattention, and that his legal representatives ought to account for the same.

That the complainant is informed and believes, that a large part of the money so received by the said Samuel Fowler, deceased, and particularly the amount so received from the said Jacob T. Sharp, was, immediately after the receipt of the same, invested by the said Samuel Fowler, deceased, for the use and benefit of the said Julia Ann, upon good and sufficient bond and mortgage; and that the said Samuel Fowler, deceased, received, from time to time, large sums for or on account of interest therefor.

That if the said Samuel Fowler, deceased, omitted to invest the moneys so received by him, or any part thereof, or used the same in his own business for his own use, his personal representatives should account for legal interest thereon; and should account for the use and occupation of such parts of the said real estate as were occupied by the said Samuel Fowler, deceased, and interest on the value of such use and occupation.

That the said Samuel Fowler, deceased, by his will, (after giving divers pecuniary and specific legacies, and devising certain of his real estate, and directing the payment of certain annuities out of his personal estate, and which he charged upon the residue of his real estate not specifically devised in case of a want of personal estate, and authorizing his executors, in that case, to sell or set apart, for such payment, such a part of the said residue of his real estate as they should deem proper,) bequeathed and devised as follows: "Then, all the rest and residue of my estate, real and personal, I give devise and bequeath unto my sons Samuel Henry Ogden, Robert Ogden and John, and my said daughters Julia, Mary Estelle, Rebecca and Clarinda, to be equally divided between them, share and share, alike; giving to my executors, nevertheless, power to sell such parts of my real estate in this clause devised as shall to them seem most advantageous to my estate." That the said Julia Ann Bigelow, whose maiden name was Julia Ann Fowlew, was the daughter of the said testator, and is the person mentioned in the said receipt given by him, in his life time, and in the said will. That the said Julia Ann attained her

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majority on or about Feb. 17th, 1834 ; and was married to and with Moses Bigelow, of Newark, on or about Feb. 4th, 1836. That on the 7th of May, 1844, by an indenture made and executed by and between the said Moses Bigelow and Julia Ann Bigelow, of the first part, and the complainant of the second part, reciting, among other things, that the said Samuel Fowler, deceased, had, in and by his will, bequeathed and devised as herein before recited ; and that the said Julia Ann Bigelow was entitled to have and receive from the said executors a large sum of money as the balance due from the said testator as her guardian ; and that the said Moses Bigelow, by reason of his said marriage and of his marital rights, had theretofore, from time to time, had and received divers sums of money derived from the estate of the said Julia Ann Bigelow, both real and personal, which she was seized of and entitled to, both before and after her said marriage, amounting to several thousands of dollars ; the said Moses Bigelow and Julia Ann Bigelow, for the consideration therein named, bargained, sold, assigned, transferred and set over to the complainant, among other things, all such sum or sums of money as the said Moses Bigelow and Julia Ann Bigelow, or either of them then was or might thereafter be entitled to by or under the said will, in any manner, by reason of any provision thereof ; and all such sum and sums of money as might be due to the said Julia Ann Bigelow from the testator as her guardian, together with free power and authority to ask, demand, sue for and receive the same in the names of the said Moses and Julia, or either of them, or in any other proper name or names or manner whatsoever, as might be necessary, upon the trusts therein declared, that is to say, to pay, transfer, assign or otherwise dispose of all the said trust moneys and property, and the interest, dividends and produce thereof, to such persons, for such purposes and in such manner as the said Julia, notwithstanding her coverture, should by any deed or deeds, writing or writings, sealed and delivered as therein set forth, or by her will, direct or appoint ; and in default of and until such direction or appointment, and so far as any such direction or appointment should not extend, to take all such measures in law and in equity as should be proper and necessary to call in, collect and reduce into money all such of the

trust property assigned and transferred as aforesaid as should not consist of money, and, with the consent of the said Julia Ann in writing, to lay out and invest the money which should come to his hands therefrom and all sum or sums of money therein mentioned, as and when the same should be received, in his name, on bond and mortgage good and sufficient within this State, and, with such consent as aforesaid, alter, vary and transfer all such bonds and mortgages, as to him should seem meet; and to stand and be possessed of all and singular the trust property and the produce, interest and dividends thereof, in trust to pay the interest and produce thereof, as and when the same should become due and be received by the complainant, during the joint lives of the said Moses and Julia, into the proper hands of the said Julia, or of such person or persons, and for such purposes as the said Julia, notwithstanding her coverture, should by writing under her hand and seal from time to time direct and appoint, in trust that the same might be for the separate and sole use and at her absolute and uncontrolled disposal, and not liable to the debts, contracts, forfeitures or engagements of the said Moses, and in case the said Julia should survive the said Moses, to pay, transfer and assign, immediately on the death of the said Moses, the said property unto the said Julia Ann; and in case the said Julia should die before the said Moses, then, from and after the death of the said Julia, to pay the interest and annual product thereof, as and when the same shall become due and be received, into the proper hands of the said Moses, or into the hands of such person or persons, and for such interests and purposes as the said Moses, by writing under his hand should from time to time, but not by way of anticipation, direct; and upon the death of the said Moses and Julia or the survivor of them, to pay, assign and transfer the said trust property to the person or persons who, under the statutes for the distribution of the estates of intestates, would be entitled to the personal estate of the said Julia in case she should die intestate. That the said Moses did, in and by the said indenture, among other things, covenant and agree to and with the complainant that he would or should not at any time prevent or obstruct the said Julia, her heirs, appointees, executors, administrators or assigns, or the complainant, from holding, enjoying, or receiving, taking and disposing of the said trust property.

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or the interest, produce or profits thereof according to the true intent and meaning of the said indenture; and that he would and should, in case the said Julia should die before him, permit the will of the said Julia, if any, to be proved, &c. That the complainant assumed and took upon himself the execution of the said trusts; and became and was, as such trustee, entitled to have and receive the moneys due to the said Julia from the said testator as her guardian, and all such moneys as the said Moses and Julia were, or either of them then was or ought to be entitled to by or under the said will, by reason of any provision thereof, and all the right, title, interest, &c., both at law and in equity, of them the said Moses and Julia, or either of them, in and to the moneys and property so assigned and transferred thereby, with full power and authority to demand, sue for and receive the same, in the names of the said Moses and Julia, or either of them, or in any other proper name or names, or manner as might be necessary. That the said Moses and Julia are now living. That the said Julia hath not at any time directed the payment, transfer or other disposition by the complainant as such trustee of the said moneys so due her from her said deceased guardian, or the moneys to which she became, was or is entitled to under the said will.

That the said testator, in his lifetime, or his legal representatives since his death, never accounted to the said Julia before her marriage, or the said Moses and Julia, or either of them, since their marriage, or to the complainant since the making of the said indenture, for or on account of the said moneys so received by the testator for the use of the said Julia, or any part thereof, or for or on account of the distributive share of the said Julia in the rest of the estate real and personal so bequeathed and devised as aforesaid, or paid the said Julia before her marriage, or the said Moses and Julia, or either of them, since their said marriage, up to the time of the making of the said indenture, or to the complainant since, anything on account of the said moneys or the said distributive share. That the said executors (the defendants) were, forthwith after the making of the said indenture, notified and informed of the making thereof; and that the complainant, by reason thereof,

was entitled to have and receive into his possession the said moneys and distributive share, in the execution of the trust directed by the said indenture.

That the complainant, or some person in his behalf, has repeatedly applied to the said L'Hommedieu and Fowler, as such executors, for a statement of the account of the testator as such guardian, and for an account of the personal estate of said testator and the interest thereof. But now so it is, &c. And sometimes they pretend, that before the making of the said indenture, or before they had notice or information thereof, the said Julia and Moses received the distributive share to which the said Julia was entitled out of the residue of the said personal estate, and executed to the said executor a release of the said distributive share; whereas the complainant charges the contrary to be true; and that if the said Julia and Moses ever did receive any part of the said distributive share, it was but a small part thereof, and not to exceed \$700, and was received after the making of the said indenture, and after the defendants, as such executors, had notice thereof, and after the creation of the said trust; that the receipt thereof was the act, and ought to be considered by this court as the act of the said Moses exclusively, and not of the said Julia. That if the said Moses and Julia executed to the said L'Hommedieu and Fowler a receipt and release for the said distributive share, such receipt and release were made and executed after the making of the said indenture and the creation of the said trust, and after the said executors were notified and informed thereof, and upon the payment to the said Moses of a sum not exceeding \$700, which was more than \$3,000 less than the distributive share to which the said Julia was entitled, and upon and by reason of representations to the said Moses as to the amount of the residue of the personal estate of said testator, and especially of particular items thereof to be distributed, made by the said L'Hommedieu and Fowler, partly deceptive and untrue, and of wrongful and fraudulent concealments made by them of divers large and important items of personal property of the testator, whereby the said Moses was intentionally by them misled and deceived as to the amount of the distributive share to which the said Julia was

entitled, and of threats and intimidations made to and practiced upon the said Moses by the said L'Hommedieu and Fowler, whereby they threatened and made him apprehensive that they would bring up claims against him, then outstanding, and attempt to set off the same against the said distributive share of the said Julia, and of attempts made by them to buy up such outstanding debts for that purpose, and of unreasonable and oppressive delay in the settlement of the estate, and not filing an inventory thereof; which has been withheld to this time, as the complainant has been informed and believes; the said Moses being then greatly embarrassed in his pecuniary affairs and in need of money. That the signing and execution of the said receipt and release were, and ought to be considered by this court, as the acts of the said Moses exclusively. That, in particular, the said executors, or one of them, untruly, and intentionally to mislead the said Moses, represented to him that the indebtedness of one Joseph E. Edsall to the estate of the said testator was only about \$4000, and that it could not be collected because of the defense of usury which could be set up against the same, and that the amount due on a bond and mortgage on certain property called the Franklin Furnace property, constituting a part of the personal property of the said testator, did not amount to ten thousand dollars; whereas the complainant charges that the amount due from said Edsall was not less than \$10,000, and that usury could not be successfully pleaded thereto, and that the amount of the said bond and mortgage was not less than \$13,000.

And the complainant submits, that if any payment was made to said Moses and Julia on account of said distributive share, and a receipt or release therefor was given by the said Moses and Julia after the making of the said indenture and the creation of the said trust, such payment, receipt or release ought not to avail against the said rights of the complainant under the indenture; or, if the court shall be of opinion, in case it shall appear that such payment, receipt and release were made and given after the said indenture was made, but without notice or information thereof to the said L'Hommedieu and Fowler, or either of them, that such payment, &c. shall have effect as against the com-

plainant, they should have effect, under any circumstances, only to the extent of the said \$700.

The bill prays an account of the moneys received by the testator as guardian as aforesaid, and also of the personal estate of the testator, and that the same may be applied in due course of administration; and that the complainant may be paid, &c.

The defendants answered separately. The answer of Fowler was filed April 9th, 1846. He admits the will and that he and L'Hommedieu proved the same, March 14th, 1844; and that this defendant possessed himself of so much of the personal estate as came to his knowledge within the State of New Jersey, a true and perfect inventory whereof is now nearly completed, amounting to \$40,000, subject to deductions for bad debts and unsettled accounts.

He admits the death of Jacob S. Thompson, and that said Julia, as his niece and one of his heirs at law, became entitled to one fifth of his real estate; and that several tracts of land, part of said real estate, were assigned to her in severalty; but that he does not know and cannot state the value thereof; and that the said Julia, as one of the next of kin, was also entitled to one fifth of the personal estate of the said Jacob S. Thompson, after paying, &c.; but how much it amounted to he has no knowledge or means of ascertaining, and therefor cannot state.

He admits that the said testator acted as the guardian of the person and estate of the said Julia, and as such took charge of her real estate after the same was set off to her, but at what precise time he does not know; nor does he know or believe that the said testator ever occupied or used the said lands; but he is informed and believes that he rented some part of said real estate to one Mark Thompson, for \$200 a year, and afterwards to one Richard Coursen, but for what rent he does not know; nor does he know how long the said Thompson and Coursen, or either of them, occupied said real estate, nor how much rent they paid for the same, except that in the books of the testator he finds a credit of \$45 to Coursen for rent, of Sept. 22d, 1833; and this defendant afterwards, but at what precise time he does not recollect, received of Coursen \$40, which he paid over to the said Julia.

He admits that the testator in his lifetime received divers sums of money of the personal estate of said Thompson for the use of the said Julia; but how much, or at what time, or what disposition he made of the same he has no knowledge except from the books of account of said testator, by which it appears that the testator received of the administrator of Thompson in Pa. on the 18th Feb., 1833, \$1315, and of one Henry J. Butterworth, on the 19th of April, 1843, \$9. Besides the said sums he has no knowledge that the testator received any other moneys of the said personal estate.

He states that by the said books of account it also appears that the said testator has charged the said Julia with divers sums of money by him paid to and for her, for expenses of the partition of said real estate, and of a controversy respecting the same before the Prerogative Court, and for board and tuition in music, traveling expenses and necessary and suitable things furnished her after she attained 21, amounting, in all, to \$3,176.28, and leaving a balance against her of \$1,505.23.

He says he is informed and believes, and therefore charges that the testator paid out divers other large sums of money for the said Julia not mentioned in the said books of account, amounting to about \$1000, which is a just charge against her.

That from the knowledge he has of the transactions of the said testator in relation to the property of the said Julia, and from the understanding in the family while she lived there, before her marriage, and from conversations between the testator and said Julia, he believes and therefore states that the whole amount of money received by the testator for her was paid out and expended by him for her use and benefit, or paid to her. And he recollects, on one occasion when he and the testator were conversing in the presence of said Julia about her property, that the testator said she was spending too much money, and had already spent more than was due to her. And at another time, after Julia had been spending some time in Washington, she mentioned to this defendant that the testator would not let her have all the money she wanted, and had told her that she had spent all the money that he had received for her from the estate of said Thompson.

That he verily believes that when Julia left the testator's

house, after her marriage, she was largely indebted to him for moneys paid to her and for her use and benefit, and that it was so understood by her and her said husband.

That he is informed and believes that the said Julia, after her marriage, was the constant object of the bounty of said testator, and that he paid to and for her, and to the said Moses on her account, divers large sums of money, but at what time, and in what sums he does not know; and also gave to her and her said husband, soon after her marriage and up to the time of his death, the possession of a large and valuable farm in Warren county, in a part of which the testator had a life estate, and in the residue the fee simple, and suffered them to receive the rents and profits thereof to the amount annually of at least \$300.

That from sundry letters of Bigelow addressed to the testator, and sundry accounts and statements in the handwriting of the testator and the said Bigelow, it appears, and this defendant believes and therefore states that the testator paid and advanced large sums to the said Bigelow, partly for his individual use, and partly for the use of the firm of Bigelow, Canfield & Ingraham; but, as this defendant believes, all at the particular request of said Bigelow, and to assist him in his business, amounting to a large sum of money, but to what sum he does not know; but he heard the testator say, a short time before his death, that he had advanced for the said Moses, in money and property, \$75,000, and would lose that amount by him; all which, he submits, is inconsistent with the idea of any indebtedness of the testator to the said Julia as set forth and claimed in the bill.

He denies that he has ever been requested to render any statement of the account of the testator as guardian of the said Julia, or otherwise, either by the complainant or any person on his behalf; and also denies that he ever had any notice or knowledge whatever, except by the bill, of the execution by the said Moses and Julia to the complainant of the said deed of trust as set forth in the bill. He says that the testator, by his will, devised a tract of land and premises in the township of Mansfield, Warren county, containing 28 acres, with valuable buildings and improvements thereon, in trust for the said Julia during her life, and after her

death to her children; and did also give and bequeath unto his executors whatever sum should at the time of his death be due to him from the firm of Bigelow, Canfield & Ingraham, or from any of the individuals of that firm, in trust to and for the exclusive use and benefit of said Julia, to be paid upon her order and receipt; and did, also, give and devise to the said Julia, in fee, the equal undivided eighth part of his real estate not thereinbefore devised; and that the value of the real estate so devised to the said Julia greatly exceeded the whole amount of money which the testator received or ought to have received and collected as guardian of the said Julia; and that the amount of the money due the testator at the time of his death, from Bigelow, Canfield & Co., and some of the individuals of that firm, also greatly exceeded any sum which the testator ever received or ought to have received as the guardian of the said Julia; and that the securities for the said debts have been and were paid and transferred to the complainant before the filing of said bill, upon the order and receipt of the said Julia; and this defendant submits that the said devises and bequests are and should be taken in satisfaction of any demand which the said Julia might have had against the testator in his lifetime; and that neither the said Julia nor any person on her behalf have any right against the executors of said testator to have an account of said guardianship.

That the testator, at the time of his death, left a paper, in his own writing, purporting to be a codicil to his said will, in the words and figures following: "This is a codicil to be added to the last will and testament of me, Samuel Fowler, which bears date on or about the 4th of December, 1842. 1st, I do hereby ratify and confirm my said will in all respects, so far as any part thereof shall be revoked, altered or addition thereto by this present codicil, and first, the first bequest in said will made to my wife Rebecca, wherein I have bequeathed to her so much of my household furniture as she may require for her own use, it is my will and intention hereby to alter and revoke the same so far in this codicil as to say, that I give and bequeath to her so much of my household furniture as she may require for her own use, and so much as may be required for the use of our children that may wish to

reside with her, and at her decease all the aforesaid furniture to be equally divided among my four daughters, Julia, Estelle, Rebecca and Clarinda. In the last bequest in the aforesaid will, I hereby revoke that part of the same so far as relates to my daughter Julia," as by reference, &c.

And this defendant says that he was advised by counsel, and believes, that he would have been able to prove that the said codicil was made and intended by the said testator as and for a codicil to the said will, and that the same was sufficiently signed and published to make it effectual to pass personal estate; and that he and his co-executors soon after the death of the testator were about to prove the said codicil, when the said Moses filed a caveat against the proving thereof; in consequence of which, such proceedings were had in due course of law, that the matter of proving the said codicil was set down for hearing before the Orphans' Court of Sussex, on the 9th of April, 1844, and afterwards continued to another term. That while the said matter was so pending in said court, the said Moses proposed to this defendant and his co-legatees an arrangement of the said matter; and after various propositions and conversations, proposed that if the other residuary legatees would transfer to him, or to some person whom he should name, certain notes and claims which the said Moses had before then transferred to the testator as a payment of the amount thereof upon his claims upon the said Moses and the said firm of Bigelow, Canfield & Co., and which are particularly mentioned in a certain article of appointment or order of the said Julia hereinafter set forth, amounting in the whole to \$5,179.71, besides interest then accrued thereon, and which were then held by this defendant as assets of the said estate, and would pay to him, the said Moses, \$700, he and his said wife would take the same in full satisfaction of all claim and demand upon the personal estate of the testator, except that portion of the same which was bequeathed in trust for the said Julia. And on this defendant declining this proposition, the said Moses urged the same with great importunity, and, among other reasons to induce the said legatees to assent thereto, he stated that if those notes and claims were placed within his control, he could, with them and the money he asked, compromise and

pay all the debts outstanding against him, and be able to resume business, and thus provide for and benefit his family more than in any other way; while, if the said notes and claims remained in the hands of the executors, their efforts to collect them would probably be ineffectual, as the debtors on the said notes and claims were of doubtful ability to pay, and that a very considerable loss would be sustained. And, after consultation and due reflection, the said legatees, including this defendant, considering that probably the said notes and claims could be turned to good account by said Moses and be of great service to him and his family, and that they might be in whole or in part lost to the estate if retained by the executors, and considering that the sum of \$700 was a mere gratuity and not due to the said Moses and his wife, but that it might, and probably would be the means of preserving the friendship and harmony of the family, agreed to the said proposition of the said Moses, and it was then supposed that all controversy about the said estate was settled between the said parties. And this defendant says that the said Moses then produced the draft of a receipt which he proposed to give upon the payment of the said \$700, but the same was excepted to by this defendant, because, by the agreement between the parties, a release of all claim against the personal estate was to be given, and thereupon a form of such release was furnished to the said Moses to be executed by him and wife in such manner that it might be duly recorded as an acquittal of the said executors. That, at a subsequent day, the said Moses presented to this defendant a release which, he believes, was copied from the draft furnished as aforesaid, or was to the same effect, purporting to be executed by the said Moses and Julia in the presence of a female wholly unknown to any of the executors or legatees, and who he said was the nurse of his said wife; and upon this defendant's excepting to the execution of the said release because of the obscurity of the subscribing witness, but more particularly for want of a proper acknowledgment by the said Julia, the said Moses pretended to be offended at what he suggested was a want of confidence in him and a reflection upon the integrity of himself and wife, and an insinuation that they would be guilty of

repudiating their contract ; but this defendant insisted upon a release duly signed and acknowledged by the said Julia before a proper officer ; and afterwards, on or about May 16, 1844, the said Moses produced a lease executed by him and his said wife and duly acknowledged by the said Julia before one of the Masters of this Court ; which said release is of the tenor and effect following : “ Know all men by these presents, that we, Moses Bigelow and Julia Ann Bigelow his wife, both of, &c., the said Julia being the daughter of Samuel Fowler, late of, &c., deceased, and called Julia in and by his will, do hereby confess and acknowledge that we have had and received of and from Elias L’Hommedieu and Samuel Fowler, acting executors of said will, \$700 in full payment and satisfaction of all legacy and legacies, distributive share and shares of the personal estate of said deceased to which we or either of us are or is or may be entitled by law under the said will, except the legacy and bequest in said will contained whereby the testator gave and bequeathed unto the executors thereof whatever sum or sums of money might, at the time of his decease, be due to him from Bigelow, Canfield & Ingraham, or from any of the individuals of that firm, in trust to and for the exclusive use and benefit of his said daughter Julia, to be paid upon her own order or receipt, and except, also, all the estate, right, interest, produce and profits which we the said Moses and Julia, or either of us, have or has or may have in the real estate of the said deceased or any part thereof which may be sold by the said executors by virtue of the said will. In witness whereof, &c., this 13th of May, 1844. Signed, sealed and delivered in the presence of J. C. Pennington.”

That this defendant, on the delivery to him of the said release, delivered to the said Moses, in the presence of the complainant, the note of this defendant for the said sum of \$700, which was received as payment of the said sum, and has since been paid by this defendant ; and at the request of the said Moses transferred and delivered the said notes and claims pursuant to the proposition of the said Moses and the said agreement, and also by the appointment and direction of the said Julia, hereinafter recited. And this defendant further states that, as the said codicil related

only to the interests of the said Julia in the residue of the said personal estate and to the household property, and that, having adjusted the claim of the said Julia in the manner aforesaid and obtained a full release and discharge of the said interest, and having also made a satisfactory arrangement with their mother about the said household property, the said residuary legatees were advised and believed that it was unnecessary to prove the said codicil ; and, accordingly, proof of the same was not attempted.

He says that the said release of said Moses and Julia was given by them with full knowledge of the said Moses, and, as this defendant was informed by him and believes, with the full knowledge and consent of his said wife. And this defendant denies that the said release was procured by any threats or misrepresentations, concealment or deception of any kind by him to or upon the said Moses, either directly or indirectly ; or that he ever withheld from said Moses or his said wife any information he possessed, or which either of them desired to receive of him, respecting the said estate ; but he states, that he informed the said Moses, before the execution of the said release, truly, of the amount of the personal estate of said testator to the best of his knowledge and belief ; and he denies that he represented to the said Moses or any other person that the indebtedness of the said Jos. E. Edsall to the estate could not be collected because of the defense of usury which could be set up against the same, or anything to that effect. He says he may and probably did tell said Moses, as in truth he might, that the indebtedness of the said Edsall to the estate was of very long standing and might probably be defeated by the plea of the statute of limitations, and that the transactions concerning the same were very loose and might be difficult to prove, and the amount uncertain if the said claim should be resisted.

He denies that he ever made any misrepresentation to the said Moses respecting the bond and mortgage on the Franklin Furnace property ; but says he believes he did state to the said Moses truly what he supposed to be the amount due thereon, since which time a claim for an allowance upon the said bond and mortgage has been made, by the owners of the equity of re-

demption, for an alleged deficiency in the quantity of lands conveyed by the testator to the mortgagors, and to secure a part of the purchase money for which land the mortgage was given.

He submits whether the attempt of the complainant, and of the said Moses and Julia through the complainant, to repudiate the said release is not a fraud upon the executors and legatees; and whether the conduct of Bigelow in procuring the arrangement of the controversy about the said codicil has not the appearance of settled design and practice upon the executors and legatees to deceive and defraud them.

He states that, although the complainant was present at the time this defendant delivered to the said Moses the said note for \$700, and saw and knew, as this defendant believes, the nature of the whole transaction, yet he gave no notice to this defendant nor said a word to him about the said trust deed, or that he was a trustee or representative of the said Julia; nor was any intimation of that kind given to this defendant except what was to be gathered from the said appointment, order or receipt made by the said Julia, in the words and figures following: "Whereas Samuel Fowler, late of, &c., deceased, made and published his will and thereby gave and bequeathed as follows: Item, I give and bequeath unto my executors whatever moneys may at my decease be due me from Bigelow, Canfield & Ingraham, or from any of the individuals of that firm, in trust and to and for the exclusive use and benefit of my said daughter Julia, to be paid upon her own order and receipt; and whereas Moses Bigelow, one of the individuals of the said firm, was individually indebted to the said deceased in a large amount of money at the time of his decease, for which a judgment has been obtained in the Supreme Court, and, as collateral security for the said money so due from him to the said deceased, did assign, transfer and set over to the said Samuel Fowler, deceased, on the 22d March, 1843, six notes drawn by Benjamin Terry, payable at the State Bank at Newark to the order of said Bigelow and by him indorsed; one dated Newark, Nov. 12, 1842, at six months, for \$208,08, and the remaining five dated March 18, 1843, one payable in four months, for \$306,15; another at six months, for \$592,87; another at eight months, for \$592,87; another at ten months,

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for \$592,87; and the other at twelve months, for \$592,87, for which the said Moses now holds the receipts of said testator expressing the purpose for which the same were assigned as aforesaid; and whereas the said firm of Bigelow, Canfield & Ingraham was also indebted to the said deceased, at the time of his death, in a large amount of money, and, as collateral security therefor, the said Bigelow, one of the individuals of the said firm, did assign, transfer and set over, on the 24th of April, 1843, the proceeds of S. S. Merriam's note, due June 16, 1842, payable to the order of said firm, for \$518,95, then in the hands of Bliss & Baldwin, Gainesville, Ala., for collection, and a note of Barrow & Wilson, dated St. Francisville, May 21, 1842, payable to the order of said firm on the 6th February, 1843, for \$422,15; and, on the same day, an order of J. W. Brunott, for the moneys he might collect on Collins & Baldwin's two notes indorsed by M. L. Meeker, of about \$708 each; and whereas the said notes and claims are now held by the executors, and for the purposes for which they were assigned as aforesaid, as per the receipts now held by the said Moses; and whereas, by the force, operation and legal effect of the said bequest, the said Julia has become entitled to the said notes as collaterals to the indebtedness so bequeathed to her: now I, Julia Ann Bigelow, wife, &c., and daughter &c., and the legatee in said will named, do hereby authorize, empower, order and direct the executors of said deceased to assign and transfer all the aforesaid notes, claims and demands to Samuel H. Pennington, of, &c. And I do hereby declare that, upon such delivery, this writing shall be a full and effectual receipt for the same from me, and a full and effectual discharge of the said executors therefrom. Witness, &c.

Signed, sealed and delivered in the presence of

J. P. PENNINGTON.

JULIA ANN BIGELOW."

Upon which said appointment is indorsed the receipt of the complainant, as follows:

"Received, Newark, May 16, 1844, of Samuel Fowler, of, &c., one of the executors of Samuel Fowler, an assignment of,

all of the notes, claims and demands mentioned and described in the within order.

(Signed) SAMUEL H. PENNINGTON.

And from two other orders or receipts respecting the claims of the said testator against the said firm of B. C. & I., or some of them, which had been bequeathed in trust for the said Julia ; to which orders or receipts, signed by the said Julia, dated May 7, 1844, he refers.

He further says that the said Moses had, pending the negotiation about the said codicil, stated that the notes and claims by him transferred to the testator on account of his claims against said Moses and his said partners were collateral security for so much of the said claims, and as such, constituted a part of the trust property bequeathed to the said Julia. And at the time of the payment of the said \$700 to the said Moses it was also so insisted ; but this defendant then claimed and still claims that the said notes and claims so transferred to the testator were not collateral to the claim of said testator, but were taken as a payment of so much thereof ; but this defendant believes, and was so advised, that if the said notes and claims were transferred according to the order of the said Julia and the request and desire of the said Moses, and a proper release and acquittance was executed to the said executors, it was of no consequence to them, nor to the legatees, whether the said notes and claims were considered as collateral security for, or a payment on said claims against the said Moses and his said partnership firm ; and therefore, only, he consented to the recitals contained in the said receipts or orders ; but this defendant expressly states that the said notes and claims constituted a part of the consideration of the said release, although at the particular desire of the said Moses it was not so expressed in the said release. He says that, after the settlement of the said claim of the said Moses and his wife to the residuary part of the personal estate, upon consultation with the said residuary legatees, it was by them thought advisable not to complete and fill the inventory of the personal estate until they should ascertain the amount of money due from said Edsall and upon the bond and mort-

Pennington v. Exrs. of Fowler.

gage on the said Furnace property and several other large and unsettled claims; but the said inventory and appraisement, so far as the same could be made with certainty, and a schedule of all the assets and personal property which had come to the knowledge of this defendant, were kept among the papers of the said estate, and at all times accessible to and subject to the examination of all the said legatees and other persons interested in the said estate; and no concealment of any kind was made or attempted in reference to any of the assets or property of the said estate. But he submits that the said Moses and his said wife, having received all the share of the said personal property due to them, and given their acquittance and release for the same, have now no right, by themselves or any other person for them, to call the executors in question respecting the same, or respecting the inventory thereof, or any proceedings relating thereto. But if, in the opinion of the Court, the said release should not be construed and taken to be an absolute bar of any further claim of the said Moses and Julia to the said personal estate, that then this defendant may be permitted to prove the said codicil, and that due and legal effect may be given to the same; and that the said notes and claims transferred in pursuance of the said agreement may be restored to this defendant, to the end that they may be applied in due course of administration according to the will; and that the said \$700 so paid may be refunded to this defendant, or made a charge against the said Julia, to be paid and allowed out of the said claims bequeathed to her in trust as aforesaid; or that such order may be made respecting the said notes and claims as the court shall think equitable and just.

The answer of the other executor is substantially the same.

Testimony was taken on both sides; and the cause was heard on the pleadings and proofs.

A. C. M. Pennington and *A. Whitehead* for the complainant. They cited 2 *Wms.' Exrs.* 923, 9; 1 *Story's Eq. Jur.*, sec. 259 and note, 307, 308, 310, 321, 384, 207, 246, 116 and on; 3 *Swanst.* 463; 1 *Ves.* 401; 6 *Simons* 576; 4 *Russell*, 35;

1 *McCord*, 389; 5 *John. Ch.* 409; 2 *Cowen*, 196; 2 *John. Ch.* 25, 256; 1 *Id.* 27, 394; 4 *Paige*, 578; 4 *John. Ch.* 104; 1 *Harr. & Gill*, 11; 1 *Hill's Ch.* 390; 16 *Peters*, 27; 1 *Vern.* 32; 4 *Cowen*, 220; 1 *Bro. Ch.* 1; 2 *Id.* 151.

D. Haines and *P. D. Vroom* for the defendants. They cited *Ward on Leg.* 248, 250; 18 *Law Lib.* 128, and notes; 2 *P. Wm.'s* 132; *Moseley*, 8; 2 *Story's Eq.*, sec. 1119, 1122; 1 *Green's Ch.* 1; 3 *P. Wm.'s* 353; 1 *Story's Eq.*, sec. 110, 121, 130, 1; 3 *Smunst.* 400, 467; 1 *Sim. & Stu.* 555; 1 *P. Wm.'s* 733; 1 *Ves. and Beam.* 30; 4 *Ves.* 849; 1 *Story's Eq.*, sec. 132; 2 *Ball & Beatty*, 171, 180; 4 *Stark. Ev.* 708; 1 *Burr. Rep.* 424; 4 *Term. Rep.* 678; 1 *Greenl. Ev.*, sec. 324; 2 *Kent's Com.* 179, 180; 13 *Peters*, 221, 231; 1 *Coxe*, 188; 2 *Stark. Ev.* 551.

THE CHANCELLOR. Samuel Fowler, deceased, died Feb. 26, 1843, leaving a will, dated Dec. 4, 1842, by which, (after giving divers pecuniary and specific legacies, and devising certain of his real estate, and directing the payment of certain annuities out of his personal estate, and which he charged upon the residue of his real estate not specifically devised, in case of a want of personal estate, and authorizing his executors in that case to sell or set apart for such payment such part of the said residue of his real estate as they should deem proper,) bequeathed and devised as follows: "Item, I give and bequeath unto my executors whatever sum or sums of money may, at the time of my decease, be due to me from Bigelow, Canfield & Ingraham, or from any individual of that firm, in trust and to and for the exclusive use and benefit of my daughter Julia, to be paid upon her own order and receipt. Item, all the rest and residue of my estate, real and personal, I give, devise and bequeath unto my sons Samuel, Henry Ogden, Robert Ogden and John, and my daughters Julia, Mary, Estelle, Rebecca and Clarinda, to be equally divided between them, share and share alike."

Julia, one of the daughters, had, in Feb. 1836, intermarried with Moses Bigelow.

After the death of the testator, and on the 7th May, 1844, by an indenture between the said Moses Bigelow and Julia

his wife, of the first part, and Samuel H. Pennington, of the second part, reciting the said will, the said Moses Bigelow and his said wife conveyed to the said Samuel H. Pennington all the interest, property, claim and demand of the said parties of the first part, or either of them, under the said will, in trust, to pay and transfer the moneys, securities, &c., to such person, for such purposes and in such manner as the said Julia notwithstanding her coverture, should, by writing under seal attested by two witnesses, or by will direct; and in default of and until such direction, and so far as any such direction shall not extend, in trust to invest, &c.; and, during the joint lives of the said Moses and Julia, pay the interest and annual produce of the trust moneys and securities into the proper hands of the said Julia, or to such person and for such purposes as the said Julia shall, by writing, from time to time direct, for the sole and separate use of the said Julia; and if the said Julia shall survive the said Moses, to pay and transfer the said moneys and securities unappointed and undisposed of to the said Julia; but if the said Moses shall survive the said Julia, then to pay the interest and annual produce of the said moneys and securities to the said Moses or such person and for such purpose as he shall, by writing, from time to time direct; but not by way of anticipation; and after the death of the said Moses and Julia, or the survivor of them, to pay and transfer the said moneys and securities to such person or persons as would, under the statutes for the distribution of the estates of intestates, be entitled to the personal estate of the said Julia. On the 20th Sept. 1845, the said Samuel H. Pennington, trustee as aforesaid, exhibited his bill against Elias L'Hommedieu and Samuel Fowler, (the latter being one of the children and devisees and residuary legatees under the will of the said Samuel Fowler, deceased,) the acting executors of the will of Samuel Fowler, deceased, for an account of the personal estate of the said testator, and for the distributive share of the said Julia thereof under the said will. The answers of the executors, filed April 9, 1846, admit, that the defendant Samuel Fowler possessed himself of so much of the personal estate as came to his knowledge within the State of New

Jersey, a true and perfect inventory whereof, the answer says, is now nearly completed, amounting to \$40,000 ; and they set up, in defense, a release, dated May 13, 1844, executed by the said Moses and his said wife, by which they acknowledge to have received from Elias L'Hommedieu and Samuel Fowler, acting executors, &c., \$700 in full payment and satisfaction of all legacy and legacies, distributive share and shares of the personal estate of said testator to which they or either of them are or is or may be entitled by law under the will of the said testator, except the bequest in said will whereby the testator bequeathed to said executors whatever money might, at his death, be due to him from Bigelow, Canfield & Ingraham, or from any of the individuals of that firm, in trust to and for the exclusive use and benefit of his said daughter Julia.

No inventory of the personal estate of the testator was shown to Bigelow and wife, or either of them, at or before the execution of the said release ; nor has any inventory of the whole personal estate of the testator yet been made ; nor have the defendants informed the court by their answers what is the true amount of such personal estate to be distributed under the residuary clause in the said will. But sufficient appears from the answers and proofs in the cause to show that the distributive share of the said Julia under the said residuary clause would be \$4,500 or more. If nothing more than this appeared in the case, it could not be gravely contended that the release would be a bar. The court would presume, either that both parties, the executors and Bigelow and wife, were under a misapprehension as to the amount of the personal estate, or that Bigelow and wife were under such misapprehension and that the executors omitted to inform them of the amount thereof ; either of which presumptions would be a sufficient ground on which to declare the release inoperative. The foregoing view gives the simple result of the transaction between the executors and Bigelow and wife. A distributive share worth \$4,500 was released for \$700.

It may readily be anticipated that the executors would not have proposed or received a proposition for such a settlement for this distributive share, or attempted to sustain it before the court, without laying before the court some circumstances

on which they acted in making or acceding to a proposition for a settlement on such terms, and on which to contend for the validity of the release.

The grounds laid before us by the executors on which they contend that the release is valid, are, first, that, after the death of the testator, a paper in his own handwriting was found in the words and figures following: "This is a codicil to be added to the last will and testament of me, Samuel Fowler, which bears date on or about the 4th of December, 1842—1st, I do hereby ratify and confirm my said will in all respects ——— so far as any part thereof shall be revoked, altered or addition thereto by this present codicil, and first, the first bequest in said will made to my wife Rebecca, wherein I have bequeathed to her so much of my household furniture as she may require for her own use, it is my will and intention to alter and revoke the same so far in this codicil as to say that I give and bequeath to her so much of my household furniture as she may require for her own use and so much as may be required for the use of our children that may wish to reside with her, and at her decease all the aforesaid furniture to be equally divided among my four daughters, Julia, Estelle, Rebecca and Clarinda. In the last bequest in the aforesaid will, I hereby revoke that part of the same so far as relates to my daughter Julia." (This paper was not signed, nor was any concluding clause added to it: it was found in just the shape above given.) That the executors submitted this paper to the Surrogate of Sussex for probate. That the said Surrogate declined admitting it to probate. That the executors proved the will. That the executors took steps for the purpose of submitting to the Orphans' Court of Sussex and of contending before that court that the said paper should be admitted to probate as a codicil. That while matters stood in this position the negotiation between the executors, or Samuel Fowler, one of the executors, and Bigelow in reference to the share of Bigelow's wife was going on; and that the hearing before the Orphans' Court was several times postponed in view of the said negotiation. That the said Samuel Fowler contended that the said paper was a codicil, and that the negotiation with Bigelow was concluded and assented to by Bigelow on the ground of the doubt existing

whether this paper was or was not a codicil. That after the negotiation with Bigelow was concluded and the release of him and his wife was obtained, it was thought by the said Samuel Fowler and the other members of the family that it was not worth while to proceed further in the matter of the said paper, and the question whether it could be admitted to probate was never submitted to the said Orphans' Court.

The next ground on which the executors contend that the release is valid is, that the executors claimed that certain promissory notes made by third persons to Bigelow, or to Bigelow, Canfield & Ingraham, which had been assigned to the testator in his lifetime, and which Bigelow claimed were assigned by him as collateral security for the debt of Bigelow or said firm to the testator, were not collaterals, and would not go to Bigelow's wife as incident to the principal debt bequeathed to her, nor to the said Bigelow, but were absolutely a part of the assets of the testator's estate, unconnected with the said debt and independent thereof; and that the consent of the executors to assign these promissory notes to some person for the use of Bigelow and wife, or one of them, and their assignment of the same accordingly, was a part of the consideration of the release. As to the nature of the paper spoken of as a codicil, if the executors were sincere in their claim that it was a codicil, it was their duty to proceed to submit the question of probate to the proper tribunal. If it was a codicil it cut off Julia entirely from any share in the residue of the personal estate; and they were out of the line of their duty in offering Bigelow anything for his wife's share of the personal estate. Several of the distributees under the residuary clause were minors. If they thought it a codicil they were guilty of a breach of duty and of trust in not submitting it for probate without any reference to or any attempt to negotiate with Bigelow; and are in breach of duty and of trust yet in omitting to submit it for probate. Executors cannot be allowed to claim a paper to be a codicil cutting off a share, and postpone from time to time the hearing upon the question, and offer so much for the share and give it, and then omit to submit the question of probate to the court. They are not at liberty thus to speculate, either for themselves or the other distributees,

on the fears of the person (a child in this case, or the husband of a child,) to be affected by the paper if it be a codicil, and, on effecting an arrangement with such person, omit to offer it for probate, and go on and settle the estate under the will which gives to such person a full share of the residue. To sanction such a proceeding would be to sanction a breach of duty in executors, and to open a door for all manner of practices by executors or claimants under a will. No higher duty rests on this court than that of insisting upon a plain, direct and faithful performance of the trust reposed in executors.

As to the matter of the collaterals before mentioned, no such consideration appears in the release; and it does not appear that they were inventoried as a part of the \$40,000. Again, I think it clear that they were collaterals.

It is manifest that the executors in their negotiation with Bigelow insisted on these two claims or grounds: that these notes were absolutely a part of the assets of the estate; and that the said paper was a codicil; and by means of these insistments reached the result of the negotiation with Bigelow. Now, if these notes were made a part of the assets of the estate, what right had they to give them to Bigelow? The other distributees were entitled to their shares of them. In assigning them they yielded to Bigelow's claim that they were but collaterals. If the insistments of the executors were correct, Julia was not entitled to \$1 of the personal estate, nor she nor Bigelow to \$1 of these collaterals. What right had the executors to say they would give Bigelow the notes, though they claimed they were assets of the estate, and give him \$700 besides, though they thought he was not entitled to \$1? It seems plain to me that the course taken by the executors shows that these claims and insistments were insincerely made for the purpose of cutting off Bigelow and wife with as little as possible. I cannot conceive that an executor having no interest himself in the residue could have adopted such a course. And this transaction can be regarded by the court only as a transaction by Samuel Fowler in his character of executor. He was not at liberty to set up such claims and objections as he made to Bigelow, in his character of executor, with a view to enlarge his share of the residue as an individual.

I am clearly of opinion that the release should be declare void, and that the executors must account to the complainant for Julia's share of the residue of the personal estate.

As to the guardianship, of which an account is sought by the bill, the facts are these: Jacob S. Thompson died January 1, 1832, intestate, seized and possessed of real and personal estate of which Julia, daughter of the testator, Samuel Fowler, was entitled to one fifth, as a niece of the said Thompson. Of this property the testator took possession in the character of guardian of his said daughter Julia, she being then a minor.

On the 8th of Feb., 1833, the testator received from the administrator of the personal estate of Thompson in Pennsylvania \$1,315, and gave a receipt therefor acknowledging the receipt of it as guardian of the said Julia. Julia's share of Thompson's real estate was set off to her in severalty, in March, 1832. The testator rented parts of this real estate so assigned to Julia and received the rents. Julia came of age February 17, 1834; and was married February 4, 1836. It does not appear that the testator took out letters of guardianship.

The answer admits that the testator acted as guardian of the person and estate of Julia; and sets up that, by the testator's books of account, it appears that the testator has charged Julia with divers sums of money, amounting to \$3,176.28, and showing a large balance against her. That from the knowledge the executor who answers as to this part of the case has of the transactions of the testator as to the property of Julia, and from the understanding in the family while she lived there, before her marriage, and from conversations between the testator and Julia, he believes that the whole amount of money received by the testator for Julia was paid out to her and for her use; and that he heard the testator on one occasion say to Julia that she was spending too much money, and had already spent more than was due her; and that on another occasion Julia told him that the testator would not let her have as much money as she wanted, and had told her that she had spent all the money that he had received for her from the estate of Thompson. That this defendant verily believes that when Julia left the testator's house after her marriage she was largely indebted to him for moneys paid to

her and for her use, and that it was so understood by her and her husband. That this defendant is informed and believes that Julia, after her marriage, was the constant object of the bounty of the testator, and that he paid to and for her, and to her husband on her account, divers large sums, and gave to her and her husband, soon after her marriage, and up to time of his death, the possession of a large and valuable farm in Warren county, and suffered them to receive the rents and profits thereof. That, from letters of Julia's husband addressed to the testator and sundry accounts and statements in the handwriting of the testator it appears, and this defendant believes, that the testator paid and advanced large sums to Julia's husband, partly for his individual use and partly for the use of Bigelow, Canfield & Ingraham; but, as this defendant believes, all at the particular request of Bigelow, and to assist him in his business. That the testator, by his will, devised a tract of land of 28 acres, with valuable buildings and improvements thereon in trust for the said Julia during her life, and after her death to her children; and did also give and bequeath unto his executors whatever sum should at his death be due to him from the firm of Bigelow, Canfield & Ingraham, or from any individual of that firm, in trust to and for the exclusive use and benefit of the said Julia, to be paid upon her own order and receipt, and did also give and devise to the said Julia, in fee, the equal undivided eight part of his real estate not before devised, and that the value of the real estate so devised to the said Julia greatly exceeded the whole amount of money the testator received or ought to have received as the guardian of the said Julia; and that the amount of the money due the testator, at the time of his death, from Bigelow, Canfield & Ingraham and some of the individuals of that firm also greatly exceeded any sum which the testator received or ought to have received as the guardian of the said Julia; and that the securities for the said debts have been and were paid and transferred to the complainant, before the filing of the complainant's bill, upon the order and receipt of the said Julia. And this defendant submits that the said devises and bequests are and should be taken in satisfaction of any demand which the said Julia might have had against the testator in his lifetime;

and that neither the said Julia nor any person on her behalf have any right against the executors of the said testator to have any account of the said guardianship.

The books of account of the testator have not been produced in evidence ; so that we are in the dark as to when the charges against Julia therein commenced, or what is the nature of the said account or charges therein, and whether the same kind of account was not kept against the other children. The belief of the defendant and the conversations spoken of by him furnish no reasons why an account of the guardianship should not be given. As to the other statements of the answer upon which it is submitted that the devises and bequests therein mentioned should be held to be satisfaction of any demand of Julia on account of said guardianship, the court may be able to form a better judgment as to that when the account of the guardianship shall be taken.

An account of the guardianship will be directed, reserving the consideration of the question whether, from anything done by the testator for Julia or paid by him to her, or from the devises and bequests made to her in the will, or both, the guardianship liability should be considered satisfied ; with liberty to both parties to take testimony in reference to this matter.

Lapse of time was mentioned in argument as a reason why an account of this guardianship should not now be called for. It was said that the testator was not strictly a guardian ; that he never took out letters of guardianship ; and that he is only to be considered as an ordinary debtor for any moneys he may have received for his daughter. I cannot concur in this view. He professed to act and did act as guardian of the estate, and received moneys expressly in that character and receipted for them in that character.

It is not a case in which the statute of limitations would be a defense, or in which a defense on principals analagous to the statute would be maintained, if the statute or lapse of time had been distinctly set up as a defence in the answer. But this was not done.

It will be referred to a Master to take both accounts.

Order accordingly.

THE STATE BANK AT MORRIS *vs.* ROBERT P. BELL and others.

On the bill filed by A. against B. and others on a mortgage, the Master reported, that there was due to the complainant on his mortgage, on the 1st August, 1842, \$16,021.51, and that the further sum of \$7,459.17 would be due to the complainant on his mortgage on the 16th October, 1842; and that there was due to B., one of the defendants, for *interest* on his mortgage, on the 23d April, 1842, \$1,096.50, and that the further sum of \$543.25 would become payable for *interest* on B.'s mortgage on the 23d October, 1842, and the like sum for *interest* every half year, until June 7, 1855, when the principal of B.'s mortgage would become due; and that a competent part of the premises could not be sold to pay what had become due to the complainant and B.; and therefore a decree was made for the sale of the premises, in parts; the proceeds of the first part to be applied to pay, first, the principal and interest due and to become due to the complainant on his mortgage, with his costs, and, if any should remain of these proceeds, then, secondly, the principal and interest due and to become due to B., with his costs; and if the proceeds of the first part be insufficient to satisfy the complainant's mortgage, his costs, and the costs of B., then that another part be sold; and if the proceeds of that should not be sufficient to pay the complainant and his costs and B.'s costs, then that another part be sold, &c. On the petition of C., who, after the filing of the bill, became part owner of the mortgage premises, stating that, since the issuing of the execution, he had paid a large part of the complainant's mortgage, and had paid to B. all the interest that was due and payable and \$600 of the principal though not due and payable; that the complainant has directed the Master to stay the sale under the execution; but that B. insists to the Master that the sale must proceed; and that the Master threatens to proceed at the instance of B.

Held, that B. had no control of the execution. And the Master was ordered not to proceed without instruction from the complainants or the further order of the court.

On the 15th of August, 1842, a final decree was made in this cause, reciting the report of a Master that there was due, on the 1st of August, 1842, to the complainants, on their mortgage, \$16,021.51, and that the further sum of \$7,459.17 would become due and payable to the complainants, on their said mortgage, on the 16th of October, 1842; and that there was due to Robert P. Bell, one of the defendants, on the 23d of April, 1842, for interest on his mortgage, \$1,096.50; and that the further sum of \$548.25 would become payable, for interest, on his said mortgage, on the 23d of October, 1842, and the like sum, for interest, every half year, until the principal of his said

mortgage, \$18,275, should become due, which would be on the 7th of June, 1855; subject however to the provisions therein mentioned touching the payment of certain rent to Mrs. Electa Jackson, wife of Jos. Jackson, and to the right of dower of Mrs. Rachel Canfield, wife of Israel Canfield, in case she survive her husband, as stated in the answer of said Bell; and that the same premises comprised in the mortgage of the complainants are also comprised in the mortgage to the said Bell, except four acres, (describing it,) on which is a large brick dwelling house, late the residence of said Bell; and that the mortgage of the complainants is prior to the mortgage of Bell; and that a competent part of the premises mortgaged to the complainants could not, in the opinion of said Master, be sold to satisfy what has become due to the complainants and to Bell, without material injury to the remaining part thereof; and that the whole of the premises mortgaged to the complainants should be sold; and that, in order to protect the respective equitable rights of the several purchasers and owners in the bill and answers in this cause mentioned in the said mortgaged premises, the same should be sold in separate parcels and in the following order, that is to say, that part of the premises so mortgaged to the complainants conveyed by said Bell and his wife to Jacob O. Drake, and by said Drake conveyed to the Stanhope Iron Company, excepting therefrom the following lots, the first excepted lot being the same that was conveyed by said Iron Company to Caleb Ayers, by deed dated Feb. 8, 1841, (describing it;) the 2d excepted lot being the same that was conveyed by said Iron Company to Pierson & Williams, by deed dated May 1, 1841, (describing it;) and the 3d excepted lot being the same that was conveyed by said Iron Company to Abm. L. Clark, by deed dated June 21, 1841, (describing it;) to pay and satisfy, in the first place, the principal and interest due and to become due to the complainants on their said mortgage, with their costs; and, if any should remain, in the 2d place, the principal and interest due and to become due to the said Bell on his mortgage, with his costs; and, if any should remain in the 3d place, the costs of said Pierson & Williams; and, in the 4th place, the costs of the said Clark.

And in case the said premises so mortgaged to the com-

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plainants, excepting thereout the brick house and lot above mentioned and the three last excepted lots, should not sell for enough to satisfy the principal and interest due and to become due to the complainants on their mortgage, with the costs of the complainants and of said Bell, then to sell the 3d excepted lot, being the said lot conveyed by said Iron Company to said Clark ; and if the proceeds of this lot, in addition to the proceeds of the first sale, should not be sufficient to pay the principal and interest due and to become due to the complainants on their said mortgage, with their costs and Bell's costs then to sell the 2d above excepted lot ; and if the proceeds should still be insufficient to pay the principal and interest due and to become due the complainants, with their costs and Bell's costs, then to sell the first above excepted lot ; and if the premises mortgaged to the complainant, excepting thereout the brick house and lot, should not sell for enough to pay the principal and interest due and to become due to the complainants, with their costs, then to sell said brick house and lot above described and which was excepted out of the conveyance by said Bell and wife to said Drake.

And thereupon decreeing that the said report be confirmed ; and that the premises mortgaged to the complainants, or so much thereof as should be sufficient, be sold in the order aforesaid ; and that a *fi. fa.* issue, directed to Wm. N. Wood, one of the Masters in Chancery, to make sale, in the order aforesaid, for the purposes aforesaid. On the 11th of August, 1848, Edwin Post presented a petition, stating the mortgage given by Bell and his wife to the State Bank at Morris, and the mortgage given by J. O. Drake to the said Bell, being the mortgage mentioned in the pleadings and decree in the said cause ; and that he, Post, has become a part owner of the said mortgaged premises ; stating the proceedings on the foreclosure bill filed by the said Bank, the report of the Master and the decree thereon ; stating that, since the said decree and the issuing of the execution thereon, he has paid large sums of money thereon to the said complainants ; and has paid to Bell, on his said mortgage, all the interest that was due thereon at the time of the said decree, and all that has since become due thereon ; and that nothing will be due to Bell for principal

until June 7, 1855; and that he has, since said decree, paid Bell \$600 on account of the principal of his mortgage, though no part of it was due; that about \$17,217.43 of principal, besides interest from April 1, 1848, remains due to the said complainants on the said decree, and \$17,340.62 of the principal of Bell's mortgage remains unpaid; that the execution upon the said decree was issued to Wm. N. Wood, one of the Masters, to be executed as therein directed; and that the Master proceeded in the execution thereof until stayed by the order and direction of the said complainants, and has been so stayed by the said complainants ever since. That since the said decree he, Post, with the persons with whom he has been associated, have expended in permanent improvements upon the mortgaged premises more than \$100,000, and that the mortgaged premises are now worth more than double what they were worth at the time of the execution of the said mortgage to Bell.

That the complainants are now satisfied to stay further proceedings on the said execution for the present, and to give the petitioner further time to pay the balance due thereon, and are willing and desirous that the said execution be stayed; and have so declared and represented to the said Master; but that said Bell declares that he has an interest in the said decree which gives him the right to insist upon the execution thereof against the wish and desire of the complainants therein, notwithstanding there is nothing now due to him on his said mortgage mentioned in the said decree; and that Bell insists to the said Master, and has directed the said Master to proceed forthwith in the execution of the said writ of *fiery facias*. That the said Master declares that he is unwilling to take any personal responsibility in the premises, and that it is the duty of the petitioner, if he desires a further stay of said writ of execution, to get the order and direction of the court therein; and that he will proceed forthwith to advertise and sell the said mortgaged premises, at the instance and on the request of Bell, unless he has the direction of this court to the contrary; and that said Master has declared that he is about to advertise the sale of said mortgaged premises, having been directed so to do by said Bell; and that public notice at this time of a sale of said mortgaged premises would particularly injure

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the petitioner in his business, and greatly embarrass him in the prosecution thereof; and that the mortgaged premises are not liable to waste or destruction so as to endanger the security of said Bell; and that the petitioner is now engaged in making large and valuable improvements thereon by means of which the value of the premises will be greatly increased; and that Bell can have no pretense for insisting on the immediate execution of the said decree other than to obtain the payment of his said mortgage money long before it is due and payable; and praying the order of the court that the said Master desist from advertising the premises for sale until directed by the complainants or by the further order of the court; and praying the order of the court upon the said complainants and the said Bell to show cause, at such time and place, &c., why the said execution should not be stayed until the order of the said complainants or of this court to the contrary; and that the Master, in the mean time, be directed to desist from proceeding on the said execution.

On this petition an order to show cause was made pursuant to the prayer thereof, and that a copy of the order to show cause be served, within six days, on the said complainants and the said Bell, or their respective solicitors, and on the said Master.

On the hearing of the motion, depositions were read establishing the material facts stated in the petition.

Leport and *A. Whitehead* in support of the motion.

J. J. Scofield and *P. D. Vroom*, contra.

THE CHANCELLOR. The decree is not a decree for sale to satisfy Bell's mortgage. It is a decree for sale to satisfy the mortgage of the Bank, the complainants in the cause; and merely provides that if, on the sale of so much of the property as shall be sold for the purpose of paying the Bank mortgage, a surplus shall arise after paying the Bank mortgage, it shall be applied on the Bell mortgage. Since the decree, the interest due Bell has been paid, and there is nothing now due Bell for

either principal or interest ; and his principal does not become due till 1855.

He has no control of the execution, and no right to direct the master to proceed to sell. It is not the duty of the Master to sell if the complainants in the cause do not desire it.

The fact that after Bell gave the Bank mortgage, he sold to a third person a part of the premises mortgaged to the Bank, and took a mortgage on the part so sold, does not give him any control over the decree and execution ; nor does the fact that the part Bell retained is incumbered only by the Bank mortgage give him the control of the decree and execution, however convenient and desirable it may be for him that the part he retains should be relieved from the Bank mortgage. His money is not due ; and there is no decree for sale to raise his money.

An order will be made, by way of instructions to the Master, pursuant to the prayer of the petition.

Order accordingly.

CITED in *Crane v. Brigham*, 3 Stock. 29, 33.

AMY RICKEY, by her next friend, *vs.* JOSEPH H. DAVIS, and
others.

Bill by one of the next of kin, against the administrator of an intestate, and the other next of kin, for a distributive share of the personal estate. The defendants set up a release executed by the complainant of all her share in the estate. The release was declared void under the proof made of the want of mental capacity in the complainant to make a valid release.

On the 4th of March 1846, Amy Rickey, who, as the bill states, being aged and infirm and incapable of managing her affairs, sues by Timothy Abbott, Junior, her next friend, exhibited her bill, stating, that Mary Olden, late of Princeton, died in Feb. 1844, and was at the time of her death possessed of and entitled to a considerable personal estate, greatly more than sufficient to pay her debts; and that the said Mary Olden died intestate and without issue, leaving the complainant, her paternal aunt, and Deborah Cooper her maternal aunt, and Mary Anne Eastburn, Francina Ely, Joseph Ely, Bennington Ely, William Ely, Susan Olden, Joseph Olden and Samuel Olden, her nieces and nephews, her next of kin her surviving.

That sometime after the death of the said intestate, one Joseph H. Davis obtained letters of administration of her goods, chattels, &c., and by virtue thereof possessed himself of her personal estate, to a large amount, that is to say, the sum of——thousand dollars, or thereabouts, as the complainant is informed and believes, more than sufficient to pay her debts, &c., which surplus became distributable among the complainant and the said other of the next of kin of the said intestate, in equal shares; the complainant being entitled to one-tenth part thereof.

That, being so entitled, the complainant had frequently and in a friendly manner, by herself and others applied to the said administrator and requested him to come to an account with the complainant of the personal estate of the said intestate, and to pay her the tenth part of said surplus. That the said Deborah Cooper and the other of the said next

of kin (naming them) severally refuse to join with the complainant in this suit, under the pretense that they have been fully paid their shares, and that the complainant is not entitled to any part of said estate, or some other pretense which they refuse to discover.

The bill prays an account of the estate of the intestate, and that the same may be applied in a due course of administration, and that the complainant may be paid her share thereof; and for such further and other relief, &c. The administrator and the said other next of kin are made defendants.

Joseph H. Davis, the administrator, in his answer admits the death, &c.; and that he possessed himself of all the personal estate of the intestate, to the amount set forth in the first schedule to his answer. That the personal estate was much more than sufficient for the payment of debts and expenses, and that the surplus became distributable as stated in the bill; and that the complainant, as one of the next of kin, would have been entitled to the one tenth part of the surplus if she had not, in the manner after stated, executed a release of all her interest in the same.

He says that there were in the possession of the intestate, at the time of her death, three separate instruments of writing each of which purported to be the last will of the said Mary Olden; one of which was in the hand writing of and signed by the said Mary Olden; another in her hand writing and sealed but not signed; and the third was in the hand writing of her brother, David Clark.

That by these several wills, or instruments of writing, the whole of her estate, with the exception of some small pecuniary legacies, was given to her nieces and nephews, no part thereof being given to either of the aunts, the complainant and the said Deborah Cooper.

That this defendant having married a niece of the said Mary Olden, and his wife having died a very short time before the death of the said aunt, he was chosen as the administrator by those who were interested in the estate. That, as soon as it was understood by the nieces and nephews that the complainant and the said Deborah Cooper were each entitled by law to an equal share of the estate, this defendant was requested to call upon the complainant to state to her the circumstances of the case; to apprise

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her of her legal rights, and to ascertain whether she was willing to execute a release of any claim she might have by law to a share of the said estate.

That in compliance with this request, and without having any personal interest in the matter, he, together with Josiah S. Worth, whom he had desired to accompany him, went to the house of Joseph Abbott, a few miles from Trenton, whose wife, Anna Abbott, was the daughter of the complainant, and with whom the complainant was then residing. Having called out Anna Abbott and Joseph Abbott, her husband, into the hall, this defendant stated to them the object of his visit, and entered into a full explanation of all the circumstances of the case, the contents of the wills, the fact that Mary Olden had died without having formally executed them, and that the complainant, being an aunt of the said Mary Olden, was entitled by law to a share of the personal estate. He told them he had come for the purpose of learning what their views and wishes upon the subject were, and what the complainant would be disposed to do in reference to the matter. Anna Abbott replied, on the part of her husband and herself, that they would not have their mother to take any portion of the estate; that it was not their wish that she should do so; that she did not need it; and that it was never intended for her. This defendant then asked Anna Abbott what he should do; and she told him to go in and mention the matter to her mother. That this defendant thereupon went into the room where the complainant was sitting, and there, in the presence of her daughter, Anna Abbott, her son-in-law, Joseph Abbott, and the said J. S. Worth, he mentioned to her the circumstances of the case, repeating substantially the statement he had previously made to Anna and Joseph Abbott, and informing her that by law she was entitled to a share of the personal property of the said Mary Olden. She replied that she did not want it, and that it was never intended for her; and then turning to her daughter and son-in-law she asked them what they thought of it. Anna Abbott replied "we think so too, mother." This defendant then stated that he had brought with him a release for her to sign if she thought proper to do so; and after having read it aloud to her and in the hearing of her daughter and son-in-law,

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she without hesitation signed it; the said Joseph Abbott and Joseph S. Worth subscribing their names as witnesses thereto. That this release, now in this defendant's possession, is in the following words:

"Know all men by these presents that I, Amy Rickey, of, &c., being the aunt and one of the heirs at law of Mary Olden, of, &c., lately deceased, for and in consideration of the sum of ten dollars to me in hand paid by Joseph H. Davis, administrator of the said Mary Olden, deceased, have and by these presents do remise, release and forever quit claim unto the said Joseph H. Davis, administrator as aforesaid, and to each and every of the heirs at law of the said Mary Olden, deceased, and to his and their and each of their heirs and assigns, all manner of claim which I now have or might have to any share or portion of the estate of the said Mary Olden, deceased, as one of the heirs at law; and that I do remise, release and forever quit claim unto the said Joseph H. Davis, and to each and every of the heirs at law of the said Mary Olden, deceased, and to them and each of their heirs and assigns, all rights or demands whatever which as heir at law or otherwise I now have or might have in law or equity to any share or portion of the estate of the said Mary Olden, deceased.

In witness whereof I have hereunto set my hand and seal this first day of March, A. D. 1844.

AMY RICKEY, [L. s.]

Sealed and delivered in the presence of

JOSEPH ABBOTT,

JOSEPH S. WORTH.

That, after the execution by the complainant of the said release, and on or about March 6th, 1844, the said Deborah Cooper also executed a release of all her interest in the estate of the said intestate, and of every claim that she might have by law against the same; which last mentioned release, signed and sealed by the said Deborah, in the presence of two witnesses who have attested the execution thereof, this defendant has, &c.

He admits that the complainant has made such applications and requests to him as in the bill are in that behalf mentioned, or to such purport and effect, but in consequence of the execu-

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tion of the said release by the complainant he has declined, &c. ; nevertheless, this defendant is willing and desirous to act in the premises, as administrator as aforesaid, under the direction and indemnity of this Court.

That he has, in the schedules annexed to his answer, set forth a true and particular inventory and account of the estate.

The inventory of the personal estate, purporting to have been made Feb. 29, 1844, is	- - -	\$12,361 84
Silver found after appraisement,	- -	205 00
Sales over appraisement,	- - -	150 04
Cash owed by J. H. Davis not appraised,	-	100 00
		<hr/> \$12,816 88

He then gives an account, including dividends and interest received up to July 1848, amounting to - \$14,140 71, and gives an account of payments amounting to - 482 94.

TESTIMONY.

Jos. Abbott, a witness for complainant.—The complainant is his wife's mother ; she is either 88 or 89 years old last month, (witness was sworn Dec. 1, 1846.) Witness remembers that Mr. Davis, one of the defendants, and J. S. Worth came to deponent's house some time after Mary Olden's death, between 12 and 1 o'clock of the day. He and his wife were going to a funeral. We met at the door. I think we had not more than got into the hall before Mr. Davis stated that mother-in-law was entitled to a share of Mary Olden's estate, as she had died intestate. He went on to say that she had made two or three wills. He then said she had made one will. I think it was the last one she made. He said her friends found her so unwell in the evening that they did not think it right for her to sign it, and that she had better leave it till morning, when she might be better ; and she was then so ill in the morning that she never did sign it. Witness, upon recollection, says it was after he spoke of the last will above mentioned that he spoke of her having made two or three other wills. The impression on witnesses's mind at the time was that the last will above mentioned was made at the time

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when she was so ill, just before her death, or a day or two before. Does not remember that anything was said as to the time when the will was prepared ; but that is the impression he was under. Mr. Davis mentioned the fact that she was thought too unwell one night to make it, and left it till the morning, and she never got better. Mr. Davis wanted to know if under these circumstances I was willing my mother-in-law should assign her right away. Something was said by Mr. Davis as to my wife being spoken to about it. He said that all the heirs had agreed to sign off or release their claims excepting Sam'l Paxson. He said that in the will which had been made his (Davis') wife and her child had been left a considerable amount, and if the will was not carried out they would not fall heir to any of it. After Mr. Davis had seen deponent's wife, they got together and concluded that we should have a repugnance to the will not being carried out as was intended, and determined to advise my mother-in-law to sign off her claim. We agreed that it should be done so : advising her to do it was of no importance as she was not competent to judge respecting it. Our motive for agreeing to this was our impression that the will was made so ; and we wished to carry out the intention of the will ; that was mine and my wife's understanding at the time ; and it was our desire that the will should be carried out. By the will here spoken of I mean the will made just previous to her death, as represented by Mr. Davis. Mr. Worth was not present at this conversation between witness and Mr. Davis at first. We went into the room after this conversation in the hall, and Mr. Worth was then present. Mother-in-law was in the room. Something was said to her about signing the release. I think by myself. I explained the object of Mr. Davis' coming there. I proposed to her to sign it. She looked up and said, " Shall I sign it ? " We told her of course to sign it, and she did sign it. Mr. Worth and I witnessed it. It was either before or after signing it that Mr. Davis undertook to read it to her ; perhaps it was before signing ; and he read a few lines, perhaps two or three lines of it to her ; and it was evident she did not understand it ; and he then undertook to explain what he had been reading. I told him it was evident she could not understand it. He said he would read on some

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more. He did so, and undertook to explain that again ; and I told him there was no use in explaining it, as she could not understand it, and he then gave it up and did not try it again ; and whether he went on to read the remainder I cannot remember ; but he did not undertake to explain it. I think, however, that he did read the remainder, but do not feel confident. They expressed a wish to get back to Trenton as soon as possible, as they said their dinner was waiting for them ; and my wife and I wished to be off to the funeral. After the instrument was signed and witnessed, as Mr. Davis was going out, he said he thought he would give her \$5. Just as he was going out of the door Mr. Worth said he had better make it ten. Davis then came back and presented the \$10 to my mother-in-law, or rather he spoke to her and said he would give her \$10. She looked up at him and asked him what it was for. He said he wanted to make her a present of it. She told him she was much obliged to him. Very shortly after that they left the house. They were at the house, witness thinks, about half an hour. My mother-in-law had lived at my house about 15 years when this occurred. She had an attack of sickness about two weeks previous to this occurrence. The attack was something similar to palsy ; rush of blood to the head. The Doctor bled her and relieved her. At the time of the occurrence above stated witness says he does not think she was competent to transact any business ; it was very clear to him ; and he expects it must have been clear to others. It was not more than two or three hours after that she stated to witness that Mary Olden had made a will and left her ten dollars. Witness heard her repeat the same thing afterwards several times ; for weeks afterwards it seemed to impress her mind very strongly. When she talked so witness would try to explain to her how it really was, and she would seem to understand it for a moment ; but afterwards it was all gone again, and the old thing returned again. It was doubtful to witness whether she understood it at all ; she looked up with that expression. She said nothing to witness that satisfied him that she understood it ; nothing of her own accord. She said nothing in answer to witness' explanations that satisfied him she understood it. Once or twice, within two or three weeks after the occurrence, she asked if Mary

Olden was dead; and upon being told she was, she then repeated that Mary Olden had left her \$10. At the time when the paper was signed witness had no expectation or belief that she understood the nature of it. He does not think she was qualified to do any business for a year before she had the attack above mentioned. She would know her friends; but almost as soon forget them. After that attack she was much worse. Her mind was almost gone except for a few moments; it was wandering, or nearly so. We invited Mr. Davis and Mr. Worth to dine with us, but they said (as before.) Mrs. Rickey's mind has been growing worse since; slowly, of course, or it would have been entirely gone long ago. Mr. Davis brought the release with him, prepared.

Cross-Examined. Witness thinks he met Mr. Davis and Mr. Worth at the door. Mr. Worth went on into the room; and the conversation between witness and Mr. Davis took place in the hall. I think it possible we might have gone into the room and then come back into the hall; but I cannot remember distinctly. I think it most likely we went into the room first. Mrs. Abbott was not in the room first, she was in the opposite room. Recollects the circumstance that Mr. Davis stated to witness that he wished to have some conversation with him and wished him to step aside. Mrs. Abbott was not with witness at that time. She was not present at the conversation in the hall during the first part of it. She was present during the latter part of it; she was called in. Mr. Davis proposed that she should be present. Thinks it probable she remained during the conversation. Mr. Davis asked Mrs. Abbott what he had better do; and she said that he, Mr. Davis, had better go in and mention it to mother-in-law. Does not recollect what was said by Mr. Davis to mother-in-law; it made no impression on witness' mind; he did not consider it of any importance. Cannot recollect whether mother-in-law said anything or not; expects she did say something besides what witness has mentioned in his examination in chief, but he cannot remember what it was. Thinks that Mrs. Rickey's inability to transact business arose from loss of memory previous to the attack above mentioned. That attack effected her faculties. Her mind after that wandered so that she did not know her

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nearest friends. This continued to be the case up to a short time before the signing. When the paper was signed she had just begun to revive a little, so as to know her friends. Witness' opinion is that when she signed the release she did not know the nature of the act she was doing. When I explained to her, as before mentioned, the nature of what she had done, I doubt whether she had any idea of what she had done; if she had it was gone in an instant. She knew Mr. Worth and Mr. Davis.

John R. Abbott, for complainant. Is a son of Jos. Abbott; complainant is his grandmother. He lives with his father, and lived there in March, 1844. Remembers his grandmother's having an attack of sickness about Feb. 15, 1844. Grandmother had been extremely childish for a year or more before that attack; so much so that it had been common in the family to say in a jocular way, "as childish as grandmother." She was worse after that attack, decidedly. On or about March 1, 1844, in his judgment, she was totally unfit to transact any business. He left home for Trenton on the morning of the day on which the release was signed. He saw his grandmother that morning before he left home. While he was getting ready she asked him if he was going home. Before he could answer, she desired him to ask his father to send for her—she was anxious to get home. Witness told her she was at home. She said she was not, that she was at Nancy Evan's and she wanted to get home. After he got back from Trenton he saw her again; having immediately gone into the room where she was. She told him that Hugh Ely had been there and had made her a present of \$10. Witness knew Mr. Davis had been there and supposed she meant him. He asked her what it was for. She said it was for signing Mary Olden's will. Witness told her Mary Olden left no will. She then said it was for putting her name to a piece of paper—she did not know what it was about. The next day she frequently stated that she had signed Mary Olden's will, and that Mary Olden had left her \$10. Frequently about that time she would ask witness what he considered the money was for; he endeavored to explain it to her; but she said she did not understand it. She asked him about that time, shortly after signing the release

several times during the course of a week, how long she had been there. He told her 15 years. She appeared to look up with great surprise, and remarked, oh, I thought I had been here but 2 or 3 weeks. The second day before she had the attack above mentioned, witness and his sister were sitting in the room with her, and she pointed to witness, and asked his sister if that was one of her family. His sister told her it was John. What, she remarked, "is it thy son John." Witness was in her room the day before the release was signed. She asked him if he had just come to town, and wanted to know how they all were at home. About that time, witness thinks it was the same occasion, she said that cousin Nancy had been very kind to her, but that she wanted to get home; she did not want to trouble her any longer. The day before the release we were sitting in the room together and witness asked her if she knew who that was, pointing to witness' mother. She said she did, it was Nancy Evans. From witness' knowledge of her and his intercourse with her, he is satisfied that at the times above stated, or the day before the release was signed, or the day it was signed and the day after, she was entirely incompetent to understand or transact any business of the kind. She was not competent to transact any business of a monetary nature. In his opinion she was not at those times competent to make any contract or any disposition of property; and this incompetency proceeded, in his opinion, from inability of mind to understand, and not from mere debility of body. This incapacity has continued from that time and still continues: she is nothing more than an infant now as regards intellect. Mr. Davis was at father's house about a week before the release was executed, on a visit, with two young ladies with him, connections of the family. It was after grandmother had the attack above mentioned. They were there two hours, probably. I was not in the house with them.

Cross-Examined. He is in his 40th year. The attack was in the nature of paralysis. She had never had a similar attack before. A physician was sent for, but not till the next morning. The physician was Dr. Taylor, of Trenton. Generally, grandmother knew the different members of the family

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for a moment, for the most part. When friends came there she would not always recognize them at first. She would not know them at first when they came in. Some one must introduce them, and then she could recollect them. After the attack, up to the time when the release was signed, she would look up with a smile as if she knew them; but could not call them by name. This took place with the neighbors and friends. Her speech was affected by the attack she had. She grew better some weeks after the attack. She never recovered as well as she had been before the attack. For a year before the attack she had not visited anywhere. He has no recollection of her having been in Trenton a year prior to the attack. She went to Trenton once after the attack. She came up and got out at Isaac Barnes'. She was in the habit of calling the members of the family by name, generally; but frequently made mistakes, as she sometimes called witness Ephraim; he had a brother Ephraim. His sisters, one or more of them, occupied the room with grandmother. Witness wrote a letter to Mr. Davis sometime after the paper was executed. The Nancy Evans referred to is a first cousin of witness' mother, and was called cousin Nancy in the family, by some.

Sarah D. Norton, for complainant. Has known Mrs. Rickey and lived neighbor to her many years, perhaps twenty. Has been in the habit of seeing her and visiting her very often. In the course of three or four years I have seen her sometimes twice a week, sometimes once in two or three weeks, sometimes once a month, and sometimes once in two or three months. Remembers her having an attack of sickness in 1844: she was very ill at that time; it was in Feb. Saw her frequently about that time. She continued sick several weeks I think. I think she was out of her mind by times altogether. There were certain questions she would ask me when I went to see her; and I could tell by that she was not in her right mind. At one time when I went to see her she asked me how long I had been married; she asked me that question two or three times in 15 or 20 minutes. I had a daughter married a short time before that, and had taken her a piece of the wedding cake: it was then she made the inquiries. And then, in a few minutes, she asked, when you moved up there?

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Before that, she knew my daughter had been getting married. She did not ask when my daughter was married; but when witness was married. This was about Feb. 1843; about a year before the attack of sickness. After the attack, in 1844, I think, her mind was worse at times. Her mind has continued pretty much in the same way up to the present time; but I think she is worse the last year since she has had more of the spells. For some weeks after she had the spell of sickness in 1844, I should not think she was capable of doing much business, at any rate, according to my weak judgment. I saw her a day or two after the attack; she was in bed. I rather think that was the first attack of the kind she had ever had. From my intercourse with her I think her mind is weaker since that attack than it was before. At times she would appear out of her mind; at times she would appear rational; and then she would not appear to know what she was talking about. I remember hearing about the execution of the release; hearing the family speak of it. I remember that she was not in her right mind about that time.

Cross-examined. I think it was just after she had the spell that I first heard about the paper. I heard such a paper had been signed; but did not learn when it was done.

Susan Abbott, for complainant. Is a daughter of Joseph Abbott, and grand-daughter of the complainant. She lives with her father, and lived there in 1844. Remembers Jos. H. Davis and Josiah Worth being at father's house about the 1st of March of that year. My grandmother was taken sick about the middle of Feb. of that year. For several days after, she was so that she could not speak so as to be understood. Her speech seemed to be affected by the attack. She was very feeble and helpless for a few days after the attack. After that she was so that she could walk about the room. The first time she came down after the attack was the day Mr. Worth and Mr. Davis were there: she was brought down in consequence of their being there. While she was up stairs after that attack and before she was brought down, she thought she was not at home; thought she was at Nancy Evan's, and called me Nancy all the time. Nancy

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Evans is Evan Evan's wife, and lives in Trenton ; and was a niece of the old lady by marriage. After Mr. Worth and Mr. Davis were there, and after that first attack, her mind has been gradually failing. She has had a number of those attacks since ; six or seven I think. I was in the room several times while Davis and Worth were there, passing through ; I did not stay. I saw, as I went into the room, Mr. Davis standing by the old lady with a paper, attempting to read it. He attempted to read it several times, and was interrupted by my father telling him that she could not comprehend it. He then gave it up after reading two or three lines. Witness did not see the paper signed ; was not in at the time. When witness went in again Mr. Davis was standing by her with a bank note. He handed it to her, and she took it and asked him what he gave her that for ; and he said, "I make you a present of it." He then turned from her and, said "I make her a present of this ten dollars out of my own pocket." I should think she was not then in a situation to enable her to comprehend or transact business. Remembers Mrs. Clark and Miss Hughes being at her father's in July 1845 ; she was at home. Thinks they got there between eleven and twelve o'clock. Thinks they left about four in the afternoon. Was in the room occasionally while they were there. Witness took it it was a friendly visit to them all. They dined there. Don't recollect that grandmother said a great deal while witness was in the room. Mrs. Clark remarked to witness how much aunt Amy was like her, Mrs. Clark's mother ; that her mother would often go and get her bonnet and shawl and dress herself up and say she was going home. That was her home and had been for several years. She would then go to a drawer and get shawls and caps and dress herself up in a ridiculous manner ; so much so, she said, she locked up her drawers to keep her from them. Grandmother was continually talking that she was going home ; talked so at that time, while Mrs. Clark was there. Witness heard her talk so. It was that that induced Mrs. Clark's remarks above mentioned. Grandmother has frequently made such remarks—that she was not at home, and wanted to go home—since that attack, and does it still almost every day. While we were standing at the door, as the carriage drove off, and before they got out of the lane, I

asked grandmother who they were, and she said she did not know, could not tell. She always says, when any body comes, that she knows them, when they speak to her; and when they are gone she can't tell who they were. This was so when Mrs. Clark was there; and is so still; and has been so ever since. Josiah Worth is an own uncle to the children of Benjamin Olden, three of the defendants.

Cross-examined. Before the attack her memory was considered pretty good for an old person. It continued to be pretty good up to the period of that attack. Don't recollect hearing her complain of her memory being very bad before that attack. Don't recollect before that that I ever heard her call persons by the wrong name. She never called me Nancy Evans before that attack. Up to the period of that attack I don't think there had been any decay of her faculties. I don't know that I should hardly have thought her capable of transacting business before that attack. She never had been in the habit of transacting business before the attack; and we thought she couldn't. Perhaps she was as capable of business at the time of the attack as she had been for several years before. I think her mind seemed to be gradually on the decline before the attack. She did not appear to enjoy company and visiting as she had done. I think there was no other evidence of her mind's declining. She had been calling me Nancy Evans ever since she had the attack; it was about ten days after the attack, or as soon as she could speak so as to be understood, that she began calling me so. She didn't know me at all. From the time of the attack to the day Worth and Davis were there she did not know me at any time. I was in the parlor when they came to the door. Amy Rickey was up stairs in her room. They wished to see her. My sister Amy Ann went up and told her there was company there and wished her to come down stairs. I believe Amy Ann brought her down. I was in the parlor when grandmother came in. Mr. Worth and Mr. Davis were in the parlor when she came in. She spoke to them. I don't recollect that she called them by name. I think not. I am clear she did not. I went directly out when she came in. I was not in again to stay, but only passed

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through the room. I was preparing for dinner. After that grandmother did not come down very often ; once in a few days or a week perhaps. The day Mr. Clark was there she came down and took a little dinner ; sat down at the table. She had dined before up stairs. She remained down until they went away. Elisha Clark, a son of Joseph Olden Clark was there. I did not tell him a story about his father. I don't think grandmother know them while they were there.

In Chief. When Mr. Davis was standing there with the paper I had just gone in the room ; and I stopped at the door to hear what he said. I stayed until he turned from her. I don't think her memory at the time of the attack was as good as it was when she was twenty years younger. There had been no decay in her faculties ; and very slight change in her memory, if any. For two years before the attack I think her mind was not as strong as it had been before. I think she talked as sensibly as formerly, nearly or quite. Since the attack she has never been able to talk sensibly as she formerly did.

Cross-examined. For two years before the attack she could not recollect things as long as she had formerly done. The change in her memory before the attack was very slight. I have no other reason for supposing her mind was not as strong but this slight change in her memory. It was in recollecting times and places she had visited, rather than in the names of persons.

John S. Taylor, for the complainant.—I have been acquainted with Amy Rickey 7 or 8 years, and perhaps longer. Have attended her as her family physician. Attended her in 1844 when she was sick. Her attack was congestion of the brain, or incipient apoplexy. I found her in a state of insensibility, and convulsed. The attack I supposed at the time to be a severe attack. She recovered from it better than I anticipated. Her speech was gone, totally. Think she did not recover it when I left, the first visit ; she was unconscious then. The muscles of her face were convulsed, and the arms. I saw her the next day ; I think she had then partially recovered her speech ; but it was

with some difficulty she could converse so as to be understood. There was a partial paralysis of the muscles of one side of the face. My impression is that the second visit was the last I made her. I think I saw her between the time of the first and second attack. I think it was two or three months after the first, that I was called to visit her under a second attack. It was of a similar character as the first, though not so violent. She was insensible and convulsed. The second or third attack was severer than the first, and I bled her; but the symptoms not yielding I opened her arm again: on reflection, this may have been the second attack. I think she had one of these attacks within a year: five altogether, if I remember right. These attacks are all attended with congestion of the brain. Such attacks for a time impair the mind of any one; in some it has a more permanent effect; debilitates the mental faculties: on old persons they are apt to be more permanent. The ordinary effect of a series of these attacks is to impair the mind, and destroy it ultimately. In the situation in which she was at the second visit I made at the first attack, she was not capable of transacting business. She knew enough on my second visit to put her tongue out when I asked her. I should not think she could have been competent to transact business a fortnight after: but I did not see her. Her mind became more impaired as she had those repeated attacks.

Cross-examined. The first attack was the 16th Feb., 1844. It was not very long before this that I had seen her. I had been in the habit of seeing and conversing with her before this. My impression is, that before this her faculties were as good as persons generally at her age: they were failing, as persons generally do in age. She would ask me two or three times while I was there how many children I had. She asked me once who I had married, though she had known before. Don't know that she seemed conscious of the failure of her memory. I remember once she asked me three times how many children I had. I always answered the questions as often as she asked them. I hardly know whether prior to this attack I would have thought her capable of transacting business or not. I don't know, couldn't say whether I thought her competent or not. At the second visit on the first

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attack she was but partially recovered. I gave directions to the family what remedies to apply and let me know if anything occurred. Judging from the condition in which I left her, I should think it would require more than two or three weeks to enable her to recover sufficiently to be capable of transacting business. The attack under which she was suffering then so affected her mind that my impression is she has never been so well since. I have known instances of persons recovering entirely from such attacks. I have not the date of the second attack: think it was in the summer; probably July. I don't recollect when the other attacks were.

In chief. The instances of recovery from such attacks were young persons. Mrs. Rickey I should take to be between 80 and 90 at that time. They did not partake of the character of epilepsy, except so far as they produced convulsive action. By way of explanation to a former answer, when I said I doubted her competency to do business a fortnight after her first attack, I meant extraordinary business, such as required a process of reasoning, as executing a release or disposing of property; that is, business which females are not in the habit of transacting.

Question by Mr. Vroom: If, at the expiration of a fortnight after the first attack, Mrs. Rickey had been told that Mary Olden was dead; that she had died without a will; that a will had been prepared for her, shortly before death, in which no part of the property had been given to her; that the will was left unexecuted by her in consequence of her inability to sign it; by reason of which she Amy Rickey became entitled to a portion of the estate; and had then been asked whether she was willing to execute a release, so as to carry out the intention of Mary Olden; was the old lady competent to execute a release under those circumstances and for those considerations? *Ans.* My opinion is she was not, judging from the state she was in when I left her.

James B. Coleman, for the complainant. I am a physician, residing in Trenton, and have been for a number of years. I am acquainted with Amy Rickey; have had some knowledge

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of her all my life ; have seen her repeatedly. I saw her at Mr. Joseph Abbott's, about 1838. I recollect I was comparing her situation as it then was with what it had been some years previous : there seemed to be a bluntness or obtuseness of the faculties. She asked me a great many questions which I looked upon as childish. In former years as I had known her, her mind was active. I have been present at part of the examination of Dr. Taylor, and heard his evidence read. The effect of an attack of the character of that described by Dr. Taylor, at that age, is generally fatal to the healthy action of the mind. The reason why I give the opinion is this : in old people some change has been effected in the substance of the brain which induces the attack : this change having taken place there is no power in the system to restore the structure to its healthy condition, and the patient is subject to repeated attacks. The mind never wholly recovers from the first attack. The perceptive faculties may be somewhat active ; but the higher powers—the reasoning faculties are never entirely restored. I would say from what I know of such attacks and from what I know of this attack from the relation of Dr. Taylor, that the subject of it would not be competent to transact important business a fortnight after it. Persons in such circumstances will often recognize acquaintances, and call them by their names, though not be able to exercise the reasoning faculties. The power of recognition is generally the last to leave the mind. I saw Mrs. Rickey yesterday ; her mind was then imbecile. I had not seen her from 1840, that I recollect, until yesterday. She could not call me by name, but inquired after my sisters, and said I recollect them—they are older than I am. Their ages are under 40, and she over 90.

Sarah Ann Hewes, for defendant. Has known Mrs. Rickey from a child. The last time she saw her was in July, 1845, on a visit at Mr. Abbott's. Witness went there expressly to see her ; had been in the habit of going to see her occasionally ; but had not seen her for rather more than two years before. Sarah H. Clark, Martha Clark, Elisha Clark and a little girl named Mary Davis was with witness on her visit to Mrs. Rickey's above mentioned. We all went expressly for the purpose of paying a visit to

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Mrs. Rickey. Thinks it was about 12 o'clock when they arrived at Mr. Abbott's; but they did not see Mrs. R. until about 2 o'clock, at dinner. We saw Mrs. Abbott when we first arrived there. We immediately inquired after Mrs. R. Mrs. Abbott told us she was quite poorly then; said she had been taking medicine and there was not much satisfaction in seeing her. We were sitting at the dinner table when Mrs. R. came down to it. She knew us when she came in and each one of us: shook hands with us; called us by name, and said she was glad to see us. We were just finishing our dinner. She sat down with us and I think eat a little dinner. She sat down with us I know. We left there between four and five in the afternoon. She was with us all the time until we left; during the whole of the the time she was conversing with witness and witness' friends, and appeared to enjoy our company. She appeared entirely herself as she used to be. Witness did not notice any difference. She inquired about her friends at Princeton: that she did two or three times in the afternoon: and she observed that she was forgetful. In the course of the afternoon she inquired after several of our neighbors and friends. I cannot remember the conversation distinctly, but it was very much as it had been formerly. She inquired particularly about the Miss Brearleys, who were our neighbors, and spoke of their mother. She conversed freely, and we had an opportunity to judge of the state of her mind. I considered her mind to be in perfect order. I had seen her about two years before when she showed a want of memory. She had been in the habit for years of saying she was forgetful. I thought her on the day we saw her capable of transacting business. Recollect her telling Elisha Clark a story about his father. I found her much better than what I expected in consequence of what Mrs. Abbott had told us. I can't think that I saw anything to lead me to suppose her mind had failed; nothing but want of memory; nothing to lead me to think but that she was perfectly conscious of what she was doing. Mrs. Abbott was not very well at the time, and we thought she received us rather coolly. We attributed it to her being unwell. We were not received with the cordiality with which we usually had been. Our reception was so cold as to make it a matter of remark

among ourselves; it was a length of time before we were asked to take off our things. Mr. Abbott and one of the daughters came in the room to see us; none of the sons came in the room where we were. The youngest daughter, Elizabeth, was sick. Our visit was entirely to Mrs. Rickey; and had nothing to do with this controversy: this matter was not in our thoughts while we were there; and never thought that had occasioned the coolness until after we left.

Cross-Examined. Had not seen Mrs. Rickey for about two years previous to the visit above mentioned. It was on a visit to Mr. Abbott's when I saw her. I was not in the habit of visiting there very frequently. I saw Mrs. Rickey and conversed with her at that time. I had heard of her sickness before I went there to see her in 1845: had heard of it some time before. Am not related to Mrs. Rickey. Mrs. Clark, my aunt, is connected with her by marriage. Mr. Clark's first wife was a sister of Mrs. Rickey. Mrs. Clark's family is distantly connected with Mr. Davis by marriage; but not at all related. On the occasion of the visit we made to Mrs. Rickey, we left there between four and five o'clock. Have not seen Mrs. Rickey since. Does not recollect exactly when she communicated to Mr. Davis what she knew about Mrs. Rickey. It has not been more than a month that she had any idea of coming here as a witness. Did not see any alteration in Mrs. Rickey's mind on my visit to her in 1845. Had heard of her sickness, but does not remember of any particulars. She entered into conversation upon different matters. Did not see anything that day to prevent her transacting any business. Did not see that her mind was impaired—but that she was free to transact any business. On my visit to Mrs. Rickey there was nothing said about Mary Olden's will—no reference to it in any way; but only about the change that had taken place in the neighborhood in consequence of her death.

In Chief. At that visit, in our conversation, Mrs. Rickey alluded to the death of Mrs. Davis as well as that of Mary Olden. The little girl with us on that occasion was a daughter of Mrs. Davis. She said she did not care about visiting

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Princeton in consequence of these changes. Mr. Davis came to my aunt's last Saturday and spoke of my coming as a witness. He inquired about my visit to Amy Rickey's, and we talked it over at that time. I had never had any conversation with Mr. Davis on the subject of the said visit until Saturday last. About a few weeks ago, a friend of mine, but not Mr. Davis, stated to me that perhaps I might be called upon as a witness: it was Mr. Worth. I said I thought not. I was at his house, and we were talking about my visit to Mrs. Rickey, when Mr. Worth so stated to me. After Mr. Davis had come from Mr. Abbott's about the release, he spoke to witness about this business: it was in the evening of the same day. From that time until last Saturday witness has no recollection that Mr. Davis has ever said anything to her on the subject.

Martha Clarke, for defendant. Have known Mrs. Rickey since 1822; and have been in the habit of visiting her occasionally. The last time I visited her was in July, 1845, in company with Miss Hughes. We met Joseph Abbott at the gate. When we got to the house we saw Ann Abbott. We inquired for Mrs. Rickey. The reply we received was, that she was not well. Mrs. Abbott said Mrs. Rickey was not well, and we could not have much satisfaction—she could not enjoy our company, or something of that kind. It was about two hours before we saw Mrs. Rickey. We were received by Mrs. Abbott coolly. When Mrs. Rickey came into the room she knew me; she knew us all, she called us by name, and told us she was glad to see us. She asked us who the little girl with us was. We told her. Then she remarked it was Acsah's (Mrs. Davis') child. The little girl was four years old. Mrs. Rickey remained with us until we left, which was about five in the evening. I had not seen her before since she was in Princeton, two or three years before. I did not perceive any material change. She conversed with as much intelligence as she did when I had last seen her. I thought her capable of transacting business. She complained of her memory being weak. She had done so on other occasions when I had seen her. Did not see any reason why I should not have enjoyed my visit to her as much as I ever did. Mrs. Abbott was

in the room the greater part of the time of my visit and took part in the conversation. I have not seen her since.

Cross-examined. Did not discover at that time that Mrs. Rickey's mind was impaired, but was as sound as it ever was. I have not taken any interest in this controversy. I am connected with the family of Mrs. Davis, and am intimate with them. I mean that my family and the family of Mary Olden are connected, and intimate. Mr. and Mrs. Davis in her lifetime were members of Mary Olden's family. My husband was the nephew of Mrs. Rickey.

Josiah S. Worth, for defendant. Mr. Davis and I went together to Joseph Abbott's to obtain a release from Amy Rickey, in March, 1844, shortly after the death of Mary Olden. I had had an acquaintance with Amy Rickey all my life; she was very intimate in the family. I accompanied Mr. Davis to the house of Jos. Abbott. Jos. Abbott came to the door and received us. He took us into the house. I can't say whether there was any person in the room; his daughter might have been there, but no other person. After sitting a short time and making the usual inquiries about health, &c., Mr. Davis invited Mr. Abbott out in the entry, and they went into the entry. I was not present with them in the entry, and heard no part of the conversation between them. Amy Rickey, I think, came into the room while they were in the entry. She came up and spoke to me, and called me by name, and said, poor Mary is gone; and then said, how is thy mother; is she gone also? I told her yes. She said her memory was so bad that she scarcely dared ask a question. I had not seen her before since the death of Mary Olden. I had no other conversation with her at that time. Mr. Abbott and Mr. Davis came in directly after the conversation above detailed. When they returned, either Ann Abbott came in with them or directly after—about the same time. The conversation, when they came in, soon turned on the release; and Mr. Davis took it from his pocket or hat, and read it. After he had read it he laid it on the table by where Amy Rickey was sitting. Jos. Abbott got up from where he was sitting and went round and

got a pen and ink, and took it, and put it on the table where she was sitting. I cannot identify the conversation which took place previous to this time. Amy Rickey took up the pen, and observed, "it was not intended for me, nor I'll have none of it," and turned round to her daughter and said "ought I?" And she answered no, by no means. Then she commenced signing it. After she had signed it, and looking it over, she said she had left out a letter. Some one in the room, I think, observed, it made no difference. She said yes, and put it in with her own hand. I do not know what letter it was, and have not seen the release since. Jos. Abbott and I are the witnesses to the release. The release is here shown to the witness and he identifies it. After the signing, Mr. Davis said to her, what shall I give you aunt Amy. She said nothing. He then handed her a ten dollar note; but she refused taking it. He then said, take that as a present from aunt Mary; and then Anna Abbott said, mother is not in any way necessitated. There might have been some other conversation, but I don't recollect it. We came away immediately after. This was before dinner: we did not dine there: we had engaged our dinners at Snowden's before we started to Jos. Abbott's. Before Amy Rickey signed the release, Mr. Davis fully explained to her the reasons why she was asked to sign it. They told her they were desirous of settling Mary Olden's estate as near her will as they possibly could. He told her that Mary Olden had made a will which she had not executed. He stated to her, that in consequence of Mary Olden not having executed her will she Amy Rickey would be entitled to a portion of her estate. I was led to believe at the time that the family understood the case perfectly. This conversation was all previous to Amy Rickey's taking her pen to sign the release and making the remark that it was not intended for her. Mr. Davis read the release without interruption from any one. While he was reading it, Jos. Abbott did not say that there was no use in reading it, that she could not understand it. I was in the room the whole time. I was seated between Mr. Abbott and Mr. Davis; and Amy Rickey was sitting the other side of the room. I did not hear any intimation from Mr. Abbott or Ann Abbott that Amy Rickey did not know what she was about. Ann Abbott observed, at some time while

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we were there, that mother had lost her memory and was very forgetful. I supposed, at the time that Amy Rickey signed the release, that she understood perfectly what she was doing. I thought so from her observations and the way she appealed to her daughter for her approbation. That was my impression at the time. I knew her memory was very much impaired: I had observed that before. I have never had any reason to change my opinion. I have never seen her since. By the manner she addressed me, and the inquiry she made, I thought she understood herself perfectly.

Cross-examined. After Mr. Davis and Mr. Abbott came into the room, witness does not recollect that Amy Rickey took any part in the conversation or said anything about it. The conversation was principally between Mr. Abbott and Mr. Davis. Amy Rickey was very attentive to it. Before that, I think Mr. Davis told her that in consequence of the non-execution of the will she would be entitled to some portion of the estate. He cannot undertake to give the conversation in its language precisely, but gives the substance of it, as he was impressed with it at the time. Mr. Davis did not state in the conversation the time when the will was written. I think he stated that the estate was left to her nephews and nieces. Does not recollect that he stated that anything was left to Amy Rickey. Does not think he stated any reason why the will was not executed. Has no recollection that he stated that Mary Olden had made other wills before. After they came in from the entry I think Mr. Abbott mentioned to Amy Rickey what Mr. Davis wanted of her, and what the object of his visit was. I cannot detail that conversation. I did not hear anything said by Mr. Davis about giving five dollars; he offered her ten dollars and she declined taking it. He then said he would give her the ten dollars as a present from aunt Mary, and she refused to take it. He then left it on the table. The release being shown to witness, he says he does not know in whose hand-writing it is. The word "ten" in the fifth line of the release, he believes to be the handwriting of Mr. Davis; it was put there I think after the release was executed and after he gave her the ten dollar note. By executed, I mean after it was signed

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and witnessed. I heard of no money mentioned until after the execution of the release. Amy Rickey took the money, at least it was left on the table. I think I saw it afterwards in her hands, but I won't be certain of that. He asked her first what he should give her. She said nothing. He then gave her a ten dollar note. Does not recollect that the old lady asked Mr. Davis what that was for when he gave her the ten dollars. Does not remember that he and Mr. Davis talked the matter over on the road from Jos. Abbott's to Trenton; thinks something might have been said about it. When I said, in my examination in Chief, that I believed the family perfectly understood the case, it was because there was no disapprobation expressed; that was one among the reasons. The family seemed perfectly willing that she should execute it. Ann Abbott said that she ought not to have any of it, meaning the property. Jos. Abbott said nothing against it; and went to get the ink and materials for Amy Rickey to sign, without being asked to do it. All the movements of the family left that impression. These were the reasons which produced the impression above stated on my mind. When the release was executed, I understood the share was to be transferred by the release to Mary Olden's estate. I cannot say that the family understood; they said nothing to the contrary. *Ques.* Was there anything said at that time about any other person signing off. *Ans.* Does not recollect that anything of the kind was said; or that any other person had signed off; or that anything was said about any other person but herself. Witness is related to all the parties concerned. His mother and Amy Rickey were first cousins. He is security on the administration bond of Mr. Davis; Charles Olden is the other security.

Elisha Clarke, for the defendant. Is nearly 23 years of age. Is the son of Martha Clarke, who has been examined as a witness in this case. Knows Amy Rickey. Accompanied his mother and others on a visit to Amy Rickey's in the summer of 1845. We went to Jos. Abbott's on a visit to Amy Rickey. It was about one hour after we got there before we saw Amy Rickey. We were at dinner when she came into the room. She appeared to know us all. I am not positive that she called us all by name, but I think

she did. I remember her calling my grandmother by name, calling her Sally Clarke. I am rather under the impression that she did call them by name, speaking to them: I am positive about grandmother. She appeared to know me, from her remarks, that I had grown considerably since she had seen me last; that I looked very much like the Clarke family. It was some time since I had seen her before; two or three years I should think. She inquired who Mr. Davis' little girl was. She knew who she was after being told. She mentioned the child's mother's name; spoke of her as Acsah Ely. We were partly done when she came in. She sat down at the table. She remained in the room. After dinner we went into the parlor: she went along with us. She took part in conversation; appeared to have the use of her faculties; appeared to understand what was said to her. I cannot tell whether she was capable of judging of any business. She appeared forgetful, and would sometimes ask things over twice; but I suppose if anything was stated to her explicitly she would have understood it.

Cross-examined. I did not remain a great while in the parlor—only a short time. Can't remember what took place in the parlor, except a little anecdote that Mrs. Rickey told me about the fondness of the Clarke family for horses, an anecdote that she had been in the habit of telling me ever since I had been acquainted with her. It was some two or three years before that since I had seen her. I was not able to perceive much of any change in her faculties; not much change. I judge from her general conversation; from the remarks she made once in a while. I have not seen her since.

William Forman, for the defendant. I reside in Princeton. Am a physician; and have been between 30 and 40 years. I have read the testimony of Dr. Taylor and Dr. Coleman in this case. I have no personal acquaintance with Amy Rickey. I do not see anything in the circumstances stated by Dr. Taylor that would necessarily have prevented her from transacting business two weeks after the attack spoken of. An opinion might now be formed as to the effect of this attack two weeks after; but it

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would be mere conjecture. This I would say in explanation. No rule, I think, can be laid down in regard to diseases of the brain as influencing the moral and intellectual powers of such general application as would justify a conclusion in any particular case. I mean the opinion must be made up on such vague grounds that it would not be worthy to be received. I can only see in the testimony of Dr. Taylor a description of symptoms which in many cases would impair the moral and intellectual powers so far as to justify him in thinking that they might have done so in the case of Mrs. Rickey. *Ques.* What do you understand by incipient apoplexy? *Ans.* To my mind the term conveys no definite idea. Apoplexy is generally preceded by symptoms which indicate its approach: when they result in loss of consciousness, sensation and all the mental and moral faculties, the patient labors under the disease. *Ques.* When the mind of an old person is impaired by an attack of this kind, do the reasoning powers in all cases fail before the perceptive faculties? *Ans.* I do not know that they do. I have seen it stated recently, but can't tell where, that the power of associating, comparing and judging, remain some time after the perceptive faculties are in a good degree suspended. The reasoning powers are, according to my observation, impaired in a greater number of cases, and more than the perceptive faculties. *Ques.* Do you see in the testimony of Dr. Taylor any evidence of that change having been effected in the substance of the brain of which Dr. Coleman speaks? *Ans.* I do not, further than that the presence of apoplexy implies an altered condition in the circulation of the brain, or a morbid excitability in the organ itself. *Ques.* Have you known any instances where old persons have retained their reasoning powers while their perceptive faculties had failed? *Ans.* I have no recollection of any such cases.

Cross-examined. *Ques.* From the description given by Dr. Taylor, in the evidence, what would you call the attack of Amy Rickey? *Ans.* I should say she had some of the symptoms of apoplexy. *Ques.* Is not the effect of an attack of that character generally fatal to the healthy character of the mind of a person of Mrs. Rickey's age? *Ans.* Generally. That effect

is caused by some change or lesion produced in the brain itself. I am not aware that a change or lesion in the brain would produce apoplexy itself; such a change or lesion in the brain may be indirectly the cause and directly the effect of apoplexy. I know of but two causes of apoplexy—irritation, and compression of the brain. There is a difference in the effects of apoplexy produced by these different causes. Apoplexy from compression is decidedly the most dangerous. One form of compression is produced by hemorrhage within the cavity of the cranium. This form of apoplexy, or apoplexy from this cause, if the hemorrhage be very extensive, is almost always fatal. Compression from mere fulness or congestion of the vessels of the brain, producing apoplexy, is frequently recovered from. In speaking of these effects from which there may be a recovery, I mean to be understood of the mind as well as the body. Recoveries will more probably take place in young persons than in old. I have never seen an apoplectic seizure in a person of her age, (Mrs. Rickey's). I have no distinct recollection; but old persons do sometimes recover from apoplexy. I think we have cases recorded of old persons recovering from apoplexy and of being restored to the vigor of mind equal to that at the time of the seizure. These recorded cases are the exceptions and not the rule. *Ques.* Do you know of any old person of the age of 85 or upwards, after having had one attack of apoplexy and subsequently a second one, that in the interval recovered the whole powers of the mind, as before the first attack? *Ans.* Not personally; nor do I at present recollect such an instance; nor in case of epilepsy. *Ques.* Does extreme old age debilitate the function of the brain as much as it does the other functions, as, for instance, the action of the muscles, sight, hearing, taste, &c? *Ans.* I would say that an impairment of the functions of the brain is generally associated with extreme old age; I have no other answer to give to this question. *Ques.* Would the conclusions derived from reasoning on the causes that produce these attacks, in very aged persons, be in favor of a complete restoration of the mind after an attack as described as Mrs. Rickey's case? *Ans.* Generally not. *Ques.* Could the causes that produce the attack or fit in a person of that age, be removed by the fit? *Ans.* A person

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may recover from the fit, but whether the fit is the cause of the recovery I cannot say. *Ques.* When the attack is produced by congestion, and the congestion be not removed, can the patient recover? *Ans.* The congestion may be removed by the subsidence of the cause which produced it. *Ques.* Is the mere memory of persons and their names a sufficient evidence of mind to transact business of any importance? *Ans.* I think not. This power of recognition of names and persons may in some instances be retained when the powers of reasoning may be very greatly impaired. I think the power of associating might exist in a limited degree without the power of reasoning closely. I am not able to answer whether the power of recognition and association do exist in the lower order of animals which are not supposed to have reasoning powers. *Ques.* What are the changes produced on the brain by age, if any? *Ans.* I do not know that there are any changes produced necessarily on the brain by old age. The brains of very aged persons are said to be of firmer consistence than in younger ones; I cannot tell what effect that would have upon the functions of the brain.

In chief. I am not satisfied entirely of the nature of the disease from the testimony of Doctor Taylor. If I were to judge from the facts which the Doctor has stated and from what he has not stated, I should think the case not sanguineous apoplexy. By sanguineous apoplexy I mean that form of the disease which results from extravasion or engorgement. Doctor Taylor not having stated the previous condition of the patient, I am not clear as to the nature of the attack. I should think it was what some pathologists term nervous apoplexy. Supposing this to have been a case of nervous apoplexy, I should think there would be much more likely a recovery than from an attack of sanguineous apoplexy. The first faculty usually impaired in the progress of age is memory. I have known old persons whose memories have become very much weakened, while their other faculties have remained in a great measure unimpaired. I have several times witnessed such cases, and I believe they are of frequent occurrence. I have known persons very old who possessed very good intellectual powers, very strong intellectual powers; whether impaired

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or not I cannot tell, not knowing them in their youth. *Ques.* Have you known persons of very advanced years whose faculties have exhibited no signs of decay except memory?

Ans. I cannot recollect of any instance in my experience when a person of middle age had two attacks of apoplexy and where in the interval the faculties were fully restored. I am perfectly satisfied there have been such cases.

Cross-examined. This nervous apoplexy grows out of irritation.

J. S. Schanck, for the defendants. I am a physician, residing in Princeton. Have no acquaintance with Amy Rickey; have read the testimony of Doctor Taylor in this case. From the facts stated by him I think he has not given sufficient data, for a certainty, for diagnosis, as to what the disease was. I would be much more willing to say what I think it was not, than what I think it was. I should think it was not a case of apoplexy, as the term is ordinarily understood by medical men. All the symptoms given by Doctor Taylor may be attributed to other causes than sanguineous apoplexy. The treatment seems not to have been such as sanguineous apoplexy would have called for. The fact that the patient was well enough the next day not to need the services of the practitioner would indicate the same. I think she may have transacted the business she was called upon to transact two weeks after the attack. I think that she may or may not have been able to transact business at that time; judging from the statement of all the circumstances of her case by Doctor Taylor, she may or she may not have been able. She may have been as capable of transacting business two weeks after that attack as before; though I would expect some slight impairment of her faculties. I think that memory is among those faculties that first fail; and old persons are often themselves conscious of this. *Ques.* Have you known old persons whose memory was very much enfeebled, but whose other faculties remained in a great measure unimpaired? *Ans.* I have not. I have known old persons whose memories were much enfeebled, but whose other faculties were such as to enable them to transact ordinary business.

Cross-examined. I should think the business she was called upon to transact so far extraordinary as that females of her years are very rarely called upon to transact such business ; but not extraordinary when the faculties necessary to transact such business are in question—not such as to require extraordinary reasoning powers. *Ques.* What business could she have been engaged in that would have required higher reasoning powers than that she was engaged in? *Ans.* Such as the counsel for the complainant is now engaged in. *Ques.* What business did you understand she was engaged in? *Ans.* I understand the law of this State to have given the old lady a certain amount of property ; that this was entirely unexpected to her ; that this was not the wish of the former owner of that property ; that all this was known to the old lady ; and then she was called upon to say whether she would take advantage of what the law gave, or permit it to go to those for whom it was intended. I should call it a mere choice, not any high degree of intellectual exercise, to arrive at the conclusion she came to. I should think it indispensable that she should understand fully the premises that I have just stated. I have not understood what was the amount of that property the law had given to her ; I should think it would make no difference whatever whether the property was large or small. She probably decided, not from *lex*, but from *jus*—upon what she considered right rather than upon law. From what I know of her circumstances I should presume she may have been capable to contract for a farm or property. *Ques.* Is that probable or otherwise? *Ans.* In a lady of her age, rather improbable ; but certainly very possible. I should think this attack was less like epilepsy than apoplexy. There are so few facts given I can hardly decide what the attack was. Such attack may be induced by immoderate quantity of indigestible food ; temporary congestion of the brain ; and, in cases of children, from teething. I would say the facts stated by Doctor Taylor are not inconsistent with the case being apoplexy. The convulsive movements, however, mentioned by him do not usually attend sanguineous apoplexy ; and, further, that the symptoms mentioned by Doctor Taylor are but little more like apoplexy than profound intoxication, or *coma*, from large doses of opium. Doctor Taylor, as

attending physician, was better able to judge of the nature of the disease than I can be from his recorded testimony. *Ques.* Was he not better able to judge of its effects? *Ans.* Perhaps he was; but, inasmuch as the disease required only another visit, and then it was, so far as I know, a considerable time before medical aid was again needed, I think the effects could not have been such as would necessarily follow an attack of decided apoplexy; and, further, in my opinion, a lady of her age could not live through repeated attacks of decided apoplexy.

P. D. Vroom and *Stacy G. Potts* for the complainant. They cited 5 *John. Ch. Rep.* 173; 2 *Cowen*, 129; 1 *Story's Eq.*, sec. 217, 218; 1 *Ball & Beatty*, 171, 181; 3 *Swanst.* 399; 1 *Vern.* 32; 1 *P. Wms.* 239; 2 *Ib.* 202; 2 *Bro. Ch.* 151; *Cowe*, 333; 1 *Ves.* 125, 7; 2 *Scho. & Lef.* 474, 486.

R. S. Field and *W. Halsted* for the defendants. They cited 2 *Eng. Eccl. Rep.* 72, 97; 1 *Adams' Rep.* 162; 1 *Halst. Ch.* 361; 4 *Ired.* 465; *Gresl. Eq. Ev.* 159; 1 *Story's Eq.*, sec. 251, 329; 4 *Sim. Rep.* 182; 2 *Myln. & Keen*, 473; 8 *Eng. Cond. Ch. Rep.* 87.

THE CHANCELLOR. I think the proofs show satisfactorily a want of mental capacity in the complainant to make a valid release.

Decree for complainant.

GERSHOM LAMBERT vs. WILLIAM HALL, SAMUEL W. HALL
and others.

A. gave to B. a bond conditioned for the payment of \$2,000; and on the same day executed to B. a writing purporting to be a mortgage to secure the payment of the said bond, referring to the bond, but no sum was stated in the said writing purporting to be a mortgage, the blank in which the sum should have been stated not being filled up. The execution of this writing was acknowledged before a proper officer; and there was a certificate of the Clerk of the County indorsed thereon stating that it was recorded May 10, 1841. The registry of the mortgage, also, was blank as to the sum. Afterwards, there was attached to the page on which the registry was made a writing, dated June 28, 1841, signed by A., stating that the sum of \$2,000 was omitted being inserted in the mortgage, and that the said sum should have been so inserted; and desiring that the mortgage might not lose its effect by the omission. In 1844, A. gave a mortgage on the same lands to C., who, previous to taking his mortgage, had examined the record of mortgages and found the record as above stated. C.'s mortgage was taken to secure an old debt from A. *Seemle*, that the said writing executed to B. would be held to be a mortgage, and to have priority over the mortgage to C.

A. gave to B. a bond and a mortgage to secure the payment thereof; and subsequently gave a mortgage to C. on the same land. Afterwards, D., an uncle of A., paid, or handed to B. two several sums of money at two different times, taking loose receipts therefor on account of the said bond held by B., and afterwards a further sum as the balance in full on the said bond; and, when the last of said sums was so paid or handed to B., the three sums were credited on the bond, the two first on account of the bond, and the last as the balance in full on the said bond; and D. took no assignment of the said bond and mortgage given to B., or of either of them.

Held, under the proofs in the case, that the said bond and mortgage, in the hands of D., were not encumbrances as against the mortgage held by C.

The bill, filed Dec. 16, 1845, is exhibited by Gershom Lambert, for the foreclosure of a mortgage, dated January 29, 1844, given by William Hall and Catharine his wife to the complainant, to secure the payment of a bond of the same date given by Hall to the complainant, conditioned for the payment of \$3,307.37 on or before Jan. 29, 1845, with lawful interest. The bill states that the mortgage was acknowledged on the said 29th of January, 1844, and that it was recorded in the Clerk's office of Hunterdon on the 30th of January, 1844. That on or about May 1, 1841, the said Hall and his said wife executed a mort-

gage on the same premises described in the complainant's mortgage, to one Hugh B. Ely, administrator, &c., of John Wilson, deceased, which was recorded on the 11th of May, 1841, at six o'clock in the forenoon ; but that the said mortgage to Ely, though drawn and written upon a printed blank mortgage, did not contain any mention of any sum of money to be secured thereby not any time of payment of any sum of money ; and that the said mortgage was so recorded without the said record containing any sum of money to be secured, or time of payment ; and that so the said record remained and still remains without any other record or thing to explain it.

That the complainant, or his agent or agents who transacted for him the business of his mortgage, previous to the execution of his mortgage, examined the records of mortgages for Hunterdon, for the purpose of ascertaining what incumbrances there were on the said premises, and found that the record of said Ely's mortgage was as above stated ; and being advised by his counsel that the said record was not according to the provisions of the statute in such case made and provided, and that the said mortgage was not an incumbrance on the premises, was induced to lend to the said Hall the said sum of \$3,307.37, and to take as security therefor his said mortgage. The complainant submits that the said Ely mortgage is not an incumbrance on the premises, or, if an incumbrance at all, is not prior to the complainant's mortgage. And the bill charges, that the said Ely mortgage, though, as he insists, it was no incumbrance, was paid off by one Samuel Hall, an uncle or some other relative of the said William Hall, and by the said Ely given up or transferred to the said Samuel Hall ; by virtue whereof the said Samuel Hall, as the complainant is informed, claims some interest in the premises. That on or about May 1, 1841, the said Wm. Hall and wife executed to Robert Ely, Smith Ely, George Ely, Mercer Ely and Gervaise Ely a mortgage on the same premises, to secure to them the payment of \$2,000 ; which mortgage, as the complainant is informed and believes, was recorded in the Clerk's office of Hunterdon prior to the recording of the complainant's said mortgage, and was intended to be an incumbrance prior to the

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complainant's mortgage, and is still outstanding, in the hands of the assignees of the Elys, as an incumbrance on the premises. That Tunis Huff is the assignee of the last mentioned mortgage.

That on the 10th of June, 1841, the said Wm. Hall and wife executed to one Samuel W. Hall a mortgage of the same premises, to secure to the said Samuel W. Hall the payment of \$3,300, which, as the complainant is informed and believes, was recorded prior to the recording of the complainant's mortgage, and was intended to be an incumbrance prior thereto, and is still outstanding, in the hands of said Samuel W. Hall. That on or about Dec. 29, 1842, the said Wm. Hall and wife executed to Samuel D. Stryker and James D. Stryker a mortgage of the same premises, to secure the payment of \$2,000, which was recorded prior to the recording of the complainant's mortgage, and was intended to be an incumbrance prior thereto, and is still outstanding, in the hands of the said Strykers, as an incumbrance on the premises.

That on the 30th of January, 1844, after the execution and recording of the complainant's mortgage, the administrator of Joseph Hall, deceased, (naming them,) recovered a judgment in the Circuit Court of Hunterdon against the said Wm. Hall, for \$551.45. That on the same day one Hugh B. Ely recovered a judgment against said Hall, in the Common Pleas of Hunterdon, for \$1,597. That on the 1st of May, 1844, the Honesdale Bank recovered a judgment against the said Wm. Hall, in the Circuit Court of Hunterdon, for \$200. That on the tenth of May aforesaid one Herman D. Gould recovered against said Hall a judgment in the Supreme Court, for \$500. That on or about the 10th of August, in the year last aforesaid, Thos. Ridgeway and Henry Budd recovered a judgment against said Hall, in the Circuit Court of Hunterdon, for \$480. That executions were issued on the said judgments, to the Sheriff of Hunterdon, who levied upon, advertised and sold the said mortgaged premises to James N. Reading and Hugh B. Ely; and on the 12th of June, 1845, executed to them a deed therefor.

William Hall and Catharine his wife, Samuel Hall, Tunis Huff, Samuel W. Hall, Samuel D. Stryker, James D. Stryker, James N. Reading and Hugh B. Ely are made defendants.

Samuel W. Hall put in his several answer. He admits the mortgage of the complainant. Admits that on the 1st of May, 1841, the said William Hall and wife executed a mortgage on the same premises to Hugh B. Ely, administrator of John Wilson, deceased, which was recorded on the 11th of May aforesaid, at 6 A. M.; and that it was made and prepared upon a printed blank, and that it did not mention or specify any sum of money to be secured thereby, nor any time of payment, and that it was so registered without the registry thereof containing or setting forth any sum to be secured thereby; but he denies that the said record remained and still remains without any other record or thing to explain it; and alleges the truth to be, as he is informed and believes, that very soon and in a few days after the said mortgage was registered as aforesaid, the fact that the sum of money intended to be secured by the said mortgage was not mentioned in the said mortgage and registry was discovered; and the same having been owing to an accidental omission or mistake in not filling up the blank at the time of the execution of the mortgage, he the said Hugh B. Ely procured from the said Wm. Hall a written instrument acknowledging the sum for which the said mortgage was given and which was intended to be inserted therein, it being \$2,000; which said paper writing the said Hugh B. Ely procured to be attached to the registry of said mortgage as a notice to all persons, and especially to all subsequent purchasers and incumbrancers, that the said mortgage was given or intended to be given to secure the sum of \$2,000.

He says he is informed and believes that, shortly before the giving of the said mortgage by said Hall and wife to said Ely, Hall had purchased of Ely, administrator as aforesaid, the property mentioned in the said mortgage, for a large amount of money; and that the deed for the premises from Ely bore date and was given on the same day on which the said mortgage was dated and given, viz: May 1, 1841. That for \$2,000 of the purchase money Hall gave to Ely, administrator as aforesaid, his bond, dated that day, conditioned for the payment of \$2,000, with interest, on the 1st of April ensuing; and that to secure the said bond the said mortgage was prepared and given; and that the omission to insert the amount in the said mortgage was accidental

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entirely. That as soon as it was discovered, means were taken, as above mentioned, to give notice to all persons interested or to become interested of the actual amount of the said incumbrance. He submits that, as the said mortgage of the said Ely was registered as aforesaid, with the paper writing or acknowledgment attached to the said record, long before the giving of the complainant's mortgage, the same was notice to the complainant with which he is in law affected.

He says that the sale of said premises, as made by Ely to Hall, was a matter of notoriety in the village of Lamberts-ville and the county or neighborhood around ; that the complainant then lived and had for many years lived about a mile or some short distance from said premises, and must therefore have known of said purchase and sale.

That he, this defendant, is informed and believes that the facts that the said mortgage was recorded without the sum being inserted, and that it was intended to secure \$2,000, and that the said sum was a part of the purchase money for the said premises, were well and publicly known in the neighborhood, and especially to the complainant, before the date of his mortgage.

He submits that the record of the said mortgage, even without the acknowledgment or notice appended to the record, was sufficient to put the complainant on inquiry. That the premises conveyed by the said mortgage are described therein as the same premises which Ely, by deed bearing even date with the said mortgage, conveyed to said Hall immediately before the execution of the said mortgage.

That he is informed and believes, that this complainant, or his agent who transacted for him his business relative to his mortgage, before the execution thereof examined the records of mortgages for Hunterdon, and found that the mortgage given to Ely was recorded without setting out any sum of money or any time of payment or defeazance ; but he says he is informed and believes, that at the very time of the said examination the said Lambert, or his agent, was apprised of the said notice or acknowledgment attached to the said record as before mentioned ; that the same was seen, examined and spoken of at the time by the said Lambert or his agent, or spoken of by others in his pres-

ence; and that the fact of the said mistake, and that the debt intended to be secured by the said mortgage was a debt of \$2,000, was perfectly known and understood by the said Lambert, or his said agent, before the date of his mortgage.

That the said \$2,000 mentioned in the said bond to Ely, and intended to be secured by the said mortgage to Ely, which bond and mortgage are now held by this defendant, was a part of the consideration of the said purchase. That, if the said mortgage should be considered invalid and insufficient, the said \$2,000, being a part of the purchase money, was a lien on the said premises when the mortgage to the complainant was given; and especially as against the complainant, who had notice of the said portion of the purchase money remaining unpaid.

He submits that his mortgage is entitled to priority according to its date, that being also the date of said purchase; that the complainant had constructive and actual notice of the said mortgage, and of the nature and consideration thereof, and has no right or equity to defeat or postpone the said mortgage given to Ely.

He admits he is an uncle of Wm. Hall: and that in May, 1844, he purchased of Ely the said bond and mortgage so given by his nephew, and that he has paid to Ely the full amount of the said bond, principal and interest; that the said bond and mortgage have been given up and transferred to him by the said Ely, and that he now holds the same as his own property. And this defendant further says, that the said bond and mortgage in his hands are in no wise paid off or satisfied to him by the said Hall or any other person; that the payments indorsed on the said bond as made by him to Ely were not made or received in extinguishment of the said bond, but as evidence that the consideration for the purchase money of the same was fully paid and satisfied by this defendant, who had become the purchaser and owner of the said bond and mortgage in good faith. And he submits that the said mortgage is a valid outstanding incumbrance upon the said premises, and is in equity entitled to be paid and satisfied out of the same.

He admits the mortgage from Hall and wife to the Elys, assigned to Tunis Huff. Admits that, on the 10th of June,

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1841, Hall and wife executed to him, by the name of Sam'l W. Hall, a mortgage on the premises for \$3,300, which was registered on the 11th of May, 1841; and which he alleges is an outstanding and valid mortgage. He admits the mortgage to the Strykers'; and the judgments stated in the bill, and the sale of the premises under them.

Tunis Huff, the assignee of the mortgage stated in the bill, given by Hall and wife to Rob't Ely, Smith Ely and others, answered, setting out that mortgage.

James N. Reading and Hugh B. Ely filed a demurrer to the bill, which was overruled.

On the 19th of March, 1846, a decree *pro confesso* was taken against Sam'l D. Stryker and James D. Stryker, and against Wm. Hall and Catharine his wife and Hugh B. Ely, absent defendants.

Joseph Besson, sworn for the defendant, Sam'l W. Hall, testified.—That he is Clerk of Hunterdon County, and was sworn into office in March, 1845. P. I. Clark was Clerk from Jan'y, 1841, to Jan'y, 1842. Witness was a clerk for said Clark during that period. Exhibit No. 1 on the part of the defendant is a paper purporting to be an abstract of a mortgage given by Wm. Hall and wife to Hugh B. Ely, Administrator, &c. of John Wilson, deceased, dated May 1, 1841. Exhibit No. 2 on the part of the defendant is a paper purporting to be a certificate by Wm. Hall that the mortgage was given for \$2,000, bearing date June 28, 1841. Exhibit No. 1 is a true copy of the abstract of the mortgage. Exhibit No. 2 is a copy of a paper attached by a wafer to the page of the record on which the mortgage is recorded. I do not know when it was attached to the record. I have thought of it since I was spoken to about it. It was a considerable time after the mortgage was recorded. I had some doubt what to do with the paper when it was brought. I do not recollect the time when it was brought. I think I attached the paper to the record myself, at the request of the person who brought it. My impression is there were two of them who came to the office with the paper. I cannot state with any certainty the length of time the mortgage was recorded before the paper

was brought. I cannot tell the year, nor the time of the year when it was brought. Before the complainant took his mortgage on the same property I have no recollection of any search having been made by him or by any one for him.

Cross-examined. I don't know who the persons were that came to the office with the paper, or if I knew I have forgotten them. My impression is it was two or three years after the mortgage was recorded when that paper was brought to the office. I can't recollect the precise time. It was after the date of the paper Exhibit No. 2 that it was brought to the office. My mind is well made up that it was a long time after the mortgage was recorded. I think it was as much as two or three years afterwards; but I may be mistaken. I have a faint recollection of two men coming in with the paper. I think I told them, (as I usually do when papers are brought to the office that were not regular,) that it ought to have been acknowledged. They then, if I recollect right, requested me to attach it to the mortgage as it is. I don't recollect anything further about it in particular.

Asher Lambert, sworn for the complainant, testified as follows: I am a son of the complainant. I resided with him, or he with me, in the township of Delaware. I was in the habit of doing my father's business for him during the last 20 years; in the practice of attending to his money matters for him, as his agent. I had no written power of attorney to act as his agent. I attended to this matter of the complainant's mortgage now in dispute so far as to search the records of mortgages, &c. I think it was between the 20th and 25th or 26th of Jan'y, 1844, when I searched the records of mortgages in Hunterdon. It was in the week before the complainant's mortgage was given. Witness being shown the record of mortgages, vol. 18, page 263, says, I examined at that time the abstract of defendant's mortgage there recorded as appears by Exhibit I. Before I examined the records Mr. Hall had promised to secure my father the payment of a certain sum of money by mortgage; and my object in examining the record was to ascertain what incumbrances were on the property before we took our mortgage. The paper Exhibit No. 2, or, the

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original, was not there at that time. I heard tell of the said paper some time afterwards; and in examining the records some time afterwards for other purposes I saw it. The date of the mortgage to my father was, I think, Jan'y 29, 1844. The mortgage was executed on Monday before Court, Jan'y term, 1844. The amount of it was \$3,307.37. My father, I think, was in his 90th year when the mortgage was executed. He was able to be about the house; he did not go out much. I do not know for what the defendant's mortgage was given. I know nothing about the mortgage except what appears on the record. I do not know that my father knew anything about it. I never heard him speak of such a mortgage; he intrusted the matter to me. I never heard either the mortgage or the amount spoken of previous to that time. My father knew nothing of it, according to my knowledge. If he had I think he would have told me; he and I acted as one in matters of business. We were in the habit of consulting each other in matters of business. We had no interest in each other's money matters; they were separate; we each had our own. I never examined the records but once, that I recollect, for the purpose above mentioned. I never was apprized in any way, at the time I examined the records, of the paper Exhibit No. 2, nor of any sum for defendant's mortgage. I saw it was blank and did not know the reason. I do not know that my father was apprized of the paper in any way. At the time of said execution of my father's mortgage I never heard Exhibit No. 2 spoken of in any way by others. I did not hear of it at all at the time the mortgage was executed to my father; not until some time after that.

Cross-examined. My father died March 1st, 1847. (This examination was on the 12th of that month.) He left a will, as is supposed. The will has not been opened. No letters, either of administration or testamentary, have been granted yet. At the time Mr. Hall proposed to give complainant a mortgage, he mentioned how many mortgages were on the property; but I don't recollect that he mentioned the amount. He said the property was good enough to secure ours yet. I understood that Hall bought the property of Dr. John Wilson, before his decease. I had not heard that Hall had paid Wilson for the property. My

father and I lived about two miles from the property at the time we took our mortgage. I don't recollect at what we valued the property at the time. I took the mortgage upon it. I don't recollect that I ever set any valuation on it; don't know that I ever heard any valuation set upon it. I examined the records to see what incumbrances there were on the property. I don't recollect how much I found on it; don't recollect at what sum I estimated the amount of the incumbrances; I have a paper somewhere which will show it. I estimated the incumbrances at what they would amount to leaving out the blank mortgage of the defendant. I did not consider that any lien upon the property. I considered the bond good between the parties. I did not know whether the bond was blank or not. I inquired whether the bond was filled up or not, of Samuel D. Stryker. He told me that he and H. B. Ely had talked about it, and Ely told him it was not blank, but was filled up afterwards. I did not inquire for what sum. I heard it talked about the village that it was for \$2,000. This conversation with Stryker was long after my father's mortgage was given; I think it was just before the sale by the Sheriff. At the time I searched the record, I inquired of Mr. Besson, the Clerk, for how much that mortgage was given. He answered that it was said to be for \$2000, but he did not know for how much. I did not inquire of any other person. I informed my father that I found such a mortgage on the record. He replied that it was put there to defraud. Neither of us took any legal advice about it before we took our mortgage. Don't recollect that we took any advice about it from anybody. The reason I did not take any advice about the mortgage was, I looked at the law relating to mortgages, which says that the mortgagee shall specify the amount of the mortgage money, and I judged from that. I informed my father what the law was about it. I had heard of the Ely mortgage before Hall proposed to give my father this mortgage. Hall got the money of my father for which our mortgage was given, long before Hall bought the property of Dr. Wilson, or gave Ely the mortgage which defendant now holds. I had heard that the mortgage was for \$2000; heard this also before our mortgage was given. Our mortgage was given to secure the money previously borrowed of my father, before Hall bought the

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property on which our mortgage is. Some of the money loaned to Hall was as far back as 1832. It was a bar-room and store talk, in and about Lambertville, about the Hugh B. Ely mortgage, both before and after my father took his mortgage, and that it was for \$2000.

When, in my examination in chief, I said I did not know for what amount Hall's mortgage was given, I meant to be understood as saying that I did not know from my own knowledge; not that I had not heard it talked about. I had heard it spoken of about the public stores and taverns as above related. I knew nothing of my own knowledge but what I saw on the record. Before I examined the record I had not heard that the mortgage was blank. After I examined the record my father and I talked about its being blank, and being fraud. It was after that I heard it being talked about in the village that it was for \$2000. I never heard of its being blank until I examined the record. Before I had examined the record, I had heard it talked about that Ely had a mortgage against Hall in which it was said to be for \$2000; but heard nothing said about a blank mortgage. I mean to say that I had heard it spoken of both before and after I searched the record, that is in this bar-room and store talk.

After searching the record I don't recollect that I enquired of Hall or H. B. Ely about it. I don't know that I ever mentioned to my father that H. B. Ely had a mortgage of \$2000 until after my father took his mortgage; then I told him it was said to be for \$2000. My father did not pay any attention to business; I attended to it for him.

In Chief. When Hall proposed to give the mortgage he mentioned to me something about the different mortgages on the property, but I do not recollect what it was about, or nothing about it, it was so long ago. I did not pay much attention to what he told me. I depended upon the record. I can't state about mortgages he mentioned to me. I had determined to examine the record for myself, and therefore placed no reliance on what he said. I am not certain that I heard anything about the Ely mortgage before I searched the record; it was a good while ago, and I did not charge my memory with it; but I stated from the best of my recollection.

I don't know now that I recollect of Hall's mentioning the Ely mortgage at the time he spoke of the different mortgages; and perhaps he mentioned them all. I can't recollect. About the time of the sale there was a good deal of talk about the Ely mortgage. Some had one opinion about it and some another. Some thought it was done to defraud, and some thought otherwise. My father thought it was done to defraud, because, the sum being left blank, it might be filled up at any time and for any sum. I don't recollect Hall's saying anything about the Ely bond and mortgage when he proposed to give a mortgage to my father. Hall said he would secure my father by a mortgage. Then I examined the record.

James N. Reading, sworn for defendant, testified. He is acquainted with the handwriting of Ezekiel Blue, the subscribing witness to the bond of Wm. Hall to Hugh B. Ely, administrator, &c., of John Wilson, dated May 1, 1841, marked exhib. X., on the part of the defendants. That the signature of said Blue, as such subscribing witness, is his handwriting; that the words "four thousand dollars" and "two thousand dollars" in the bond are in Blue's writing. That he is also acquainted with the handwriting of Wm. Hall, the obligor, and that the signature to the bond is his writing. (The mortgage given to secure this bond is exhibited.)

Hugh B. Ely was examined by consent of parties, for the defendant, Sam'l W. Hall. He was acquainted with Wm. Hall; has understood he was dead. It is said he removed to the Western country about two years ago. He owned a mill property in Lambertville. I held a mortgage on this property for him and his wife. My mortgage was for \$2,000. I think it was dated May 1, 1841. More than \$2,000 was due me from Wm. Hall when he gave the mortgage. For the balance over and above the mortgage he gave me his note. The mortgage and note were given for part of the purchase money of the mill property. It was due to me as administrator with the will annexed of John Wilson, deceased. At the same time that I took the mortgage I gave him a deed, as administrator as aforesaid, for the property;

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the deed bore the same date with the mortgage. After the mortgage was given I was informed that the consideration of \$2,000 had not been put in the mortgage. I supposed it had been done at the time of its execution. The sum was omitted by mistake. I took it for granted the sum was in. The bond and mortgage were all prepared except the sum. They were prepared by Judge Blue; after which they were brought to the house of Wm. Hall for execution, by Judge Blue. He inquired what sum he should insert in the bond and mortgage, and was told \$2,000. He then went to the table with the papers before him, and, as I supposed, filled the blanks in the bond and mortgage with \$2,000. I did not learn that the sum had been left out of the mortgage till some time after; not till after the mortgage had been taken to the Clerk's office to be recorded. On hearing of the omission I went to Flemington and found it to be so; after which I procured the signature of Wm. Hall to a paper which I drew up, stating, in substance, the true consideration of the mortgage. This paper, so signed, I caused to be appended to the record of the mortgage in the book of records. Exhib. No. 2, on the part of defendants, he has no doubt, is the paper he caused to be so appended. On getting this paper signed by Wm. Hall, I took measures to have it sent immediately to the Clerk's office. My impression is I left it with Wm. Hall, and that he promised to send it by his boy immediately. About the time when I discovered the omission and got this writing from Hall, I talked with various persons in Lambertville about my having a mortgage for \$2,000 on said mill property. Robt. Ely, one of the parties who held the next mortgage, frequently joked me about it; insisting that his mortgage was first, because of the omission in my mortgage. Robt. Ely had several interviews with me before my mortgage was given, wishing to have the first mortgage. This I did not agree to, and after we discovered the omission in my mortgage he pleased himself that he was first after all. I sold my mortgage to Saml. W. Hall. He paid me the full value for it, being the \$2,000, with the interest. Witness has no interest in the question between the parties in this cause in reference to this mortgage.

Cross-Examined. The mill property was sold to Wm. Hall

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some considerable time before I made a deed to him for it. John Wilson sold the property, in his lifetime, to Hall. Hall paid some on it and took possession in the lifetime of Wilson. I can't say how long it was before Wilson's death that Hall took possession ; it was some considerable time ; a year or more. Wilson died in Oct., 1835. The dwelling house and store house were on the property when Wilson sold it ; I think so ; I may be mistaken in this. The mill with the appurtenances were put up by Hall before the deed or mortgage was given. I should think that the mill and appurtenances put on the property by Hall were fully equal to the value of the property when sold by Wilson, and that these improvements were put on before my mortgage was given. The purchase money agreed upon between Hall and Wilson was somewhere between \$8,000 and \$10,000. There was due on it at the death of Wilson somewhere between \$6,000 and \$7,000. At the time I took my mortgage, Wm. Hall told me the property stood him in over \$30,000. When I took my mortgage I should have considered the property cheap at \$20,000 or \$25,000.

When Judge Blue had the bond and mortgage at Wm. Hall's, I looked at the bond and took it home with me. I was satisfied with the bond before. I heard of the omission in the mortgage. I did not take the mortgage with me ; I left it with Hall, to be sent to the Clerk's office. I had every confidence in Hall. Hall and I agreed on the sum to be put in the mortgage, on the day it was executed. I had intended to have the whole sum put in, but was induced by Hall's promises to put in the sum as stated. I can't tell when the writing Exhib. 2 on the part of defendants got to Flemington. (The Clerk's office is at Flemington.) The persons I talked with in Lambertville about my mortgage, soon after the mortgage was given, were Dr. John Lilly, Samuel D. Stryker and others. It was no secret. At the time I sold the mortgage to Sam'l W. Hall, he came to me and said he wanted to pay off that mortgage, or that he was going to make a payment ; he wanted to take up that mortgage. I do not remember that I assigned the mortgage to him when the last payment was made. He did not wish any receipt on the bond, but wished a loose receipt ; and when he made the last payment

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he gave up the loose receipt and I gave him the bond and mortgage. My impression is that I did not assign the mortgage.

In chief. I do not remember the language used by Samuel W. Hall when he came to pay me money on the mortgage. I do not know what understanding there was between Wm. and Sam'l W. Hall as to paying off this mortgage. There was nothing said by Sam'l W. Hall from which I could infer that this mortgage was to be cancelled or that it was not to be cancelled. My impression was that Sam'l W. Hall, in taking up this mortgage, intended to take my place. This I gathered from the whole transaction, and not from any thing in particular said at the time by Sam'l W. Hall. There was a great deal said at the time which I cannot now particularly remember. At this time I wanted my money on the mortgage, and I had so informed Wm. Hall.

Again cross-examined. When Sam'l W. Hall came there about this mortgage, I can't pretend to state the language he used ; but I understood from him that he came here to take up or pay off this mortgage. He first, perhaps, asked me if I did not hold such a mortgage against Wm. Hall ; said he had some money by him, he would pay that, and he would have some more by and by, and come over and pay it. He then said he would take loose receipts, and not have it receipted on the bond. This is all that I recollect of being said on this subject. Samuel W. Hall did not tell me his views in this transaction ; but I thought that his object was to take my place.

In Chief. When I use the words "pay or take up the mortgage," being the words attributed to Sam'l W. Hall, I did not understand that the mortgage was to be cancelled. There was nothing said like it or about it. My impression was that Sam'l W. Hall was going to take my place ; but not from anything he said, that I can recollect.

Exhib. No. 1, on the part of the defendants, being a copy of the abstract of the mortgage as it appears on the record, is as follows :

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WM. HALL and wife to HUGH B. ELY, Administrator of Dr. John Wilson, deceased.

Mortgage deed, made the 1st day of May, 1841, between William Hall, of Lambertville, in Amwell township, &c., and Catharine his wife, of the one part, and Hugh B. Ely, Administrator, with the will annexed of Doct. John Wilson, of, &c., of the other part. Whereas the said William Hall, in and by a certain obligation under his hand and seal duly executed, bearing even date herewith, stands firmly bound unto the said Hugh B. Ely in the sum of _____, lawful money, &c., conditioned for the payment of _____ on the 1st day of April next ensuing the date thereof, with lawful interest for the same: Now this Indenture witnesseth, &c., for all that certain, &c., (describing the premises.) And it is the same premises which the said Hugh B. Ely, in a deed bearing even date herewith, granted and confirmed to the said William Hall immediately before the execution hereof. Together, &c. To Have, &c. Provided &c.

W. HALL, [L. s.]

CATHARINE ANN HALL, [L. s.]

Sealed, &c., in the presence of EZEKIEL BLUE.

Acknowledged, &c. Recorded May 11, 1841. Exhibit No. 2 on the part of the defendant is as follows: Whereas I, Wm. Hall, of, &c., did, on the 1st day of May last, execute a mortgage, with bond and warrant of Attorney, to Hugh B. Ely, Administrator, &c. of the estate of Dr. J. Wilson, deceased, for the payment of \$2,000 on the 1st day of April next, with lawful interest: Now, know ye who it may concern, that the said sum of \$2,000 was omitted being inserted in the said mortgage. I do hereby certify that the said sum of \$2,000 should have been inserted, and I desire that it may not lose its effect by the omission. Witness my hand and seal this 28th day of June, A. D. 1841.

W. HALL, [Scroll.]

Witness present, THOS. J. SHREEVE.

There is no assignment to Sam'l W. Hall of the mortgage from Wm. Hall and wife to Hugh B. Ely. The indorsements of payments on this bond are as follows:

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[\\$800] Received, May 6, 1844, of Sam'l W. Hall eight hundred dollars on account of this bond.

H. B. ELY, *Adm'r.*

[\\$665] Received, May 21, 1844, of Sam'l W. Hall six hundred and sixty-five dollars on account of this bond.

H. B. ELY, *Adm'r.*

[\\$929,09] Received, April 21, 1845, nine hundred and twenty-nine dollars and nine cents, balance in full on this bond.

H. B. ELY, *Adm'r.*

The bond and mortgage from W. Hall and wife to Sam'l W. Hall are dated June 10, 1841, and are conditioned the payment of \$3,300, on the first day of May thereafter, with interest from the first of May, 1841. This mortgage was acknowledged June 10, 1841, and recorded June 11, 1841.

There is a credit on this bond as follows: "May 1, 1842, received on the within the interest in full by me.

SAM'L W. HALL."

J. H. Wakefield and *A. Wurts*, for the complainant. They cited 4 *Kent's Com.* 134, 154; *Rev. Stat.* 657; *Halst. Dig.* 627; 2 *Green's Ch. Rep.* 43; 47 *Law Lib.* 55; *Rev. Stat.* 644; 1 *John. Ch.* 299; *Saxton's Ch.* 205; 7 *Wheat.* 446; *Bin. Rep.* 40; 3 *Cranch* 140; 2 *Cowen* 246, 296.

P. D. Vroom, for the defendant, *Samuel W. Hall*. He cited 1 *John. Ch.* 300; 8 *Cowen* 262; 2 *Green's Ch.* 397; 47 *Law Lib.* 89, 15; 5 *Price* 306; 3 *Mylne & Keen* 699; 3 *Green's Ch.* 173.

THE CHANCELLOR. Wm. Hall executed and delivered on the 1st of May, 1841, to Hugh B. Ely, administrator, &c., of Dr. John Wilson, deceased, a bond in the penal sum of \$4000, conditioned for the payment of \$2000, on the 1st of April thereafter, with lawful interest. On the same day, William Hall and Catharine Ann his wife

signed, sealed and delivered to the said Hugh B. Ely, administrator as aforesaid, a writing purporting to be a mortgage on lands therein described. This writing states, that, whereas the said Wm. Hall, in and by a certain obligation under his hand and seal, duly executed, bearing even date therewith, stands firmly bound unto the said Hugh B. Ely, in the sum of ———, lawful money, conditioned for the payment of ——— in like money, on the first day of April next ensuing the date thereof, with lawful interest for the same, as in and by the said recited obligation and the condition thereof, relation thereto being had, may more fully and at large appear. Now this indenture witnesseth that the said Wm. Hall and Catharine Ann his wife, as well for and in consideration of the aforesaid debt or sum of [blank,] and for better securing the payment of the same, with interest, unto the said Hugh B. Ely, in discharge of the said recited obligation, as of the sum of one dollar to them paid by said Ely, (the writing then conveys the premises therein described to the said Ely, and states that they are the same premises which the said Ely, by deed bearing even date therewith, conveyed to the said Wm. Hall, immediately before the execution thereof.) Provided, nevertheless, that if the said Wm. Hall, his heirs, &c., shall well and truly pay to the said Hugh B. Ely, his executors, &c., the aforesaid debt or sum of ———, on the day and time herein before mentioned for the payment thereof, with interest for the same, according to the condition of the said recited obligation, this indenture and the said recited obligation to be void. This writing was signed and sealed in the presence of Ezekiel Blue, the subscribing witness, and was acknowledged before him as a Judge, &c.; and there is indorsed thereon, a certificate of the Clerk of the Co. of Hunterdon that it was received in his office on the 11th of May, 1841, and recorded in vol. 18 of mortgages, fol. 263 and 4.

The registry of the said writing in the Clerk's office is as follows, viz.:

WM. HALL and WIFE, to HUGH B. ELY, administrator, &c., of DR. JOHN WILSON, deceased.

Mortgage deed made the first day of May, 1841, between

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Wm. Hall, of Lambertville, in Amwell township, Hunterdon county, and State of New Jersey, and Catharine his wife, of the one part, and Hugh B. Ely administrator, &c., of Dr. John Wilson, deceased, of the other part. Whereas the said Wm. Hall, in and by a certain obligation under his hand and seal duly executed, bearing even date herewith, stands firmly bound unto the said Hugh B. Ely, in the sum of ———, lawful money, &c., conditioned for the payment of ———, on the first day of April next ensuing the date thereof, with lawful interest.

Now this indenture witnesseth, &c., for all that certain, &c., (describing the premises;) and it is the same premises which the said Ely, in a deed bearing even date herewith, granted and confirmed unto the said Wm. Hall, immediately before the execution thereof. To have and to hold, &c. Provided when paid to be void, &c.

WM. HALL, [L. s.]

CATHARINE ANN HALL, [L. s.]

Sealed, &c., in the presence of EZEKIEL BLUE.

Acknowledged May 7, 1841, before Ezekiel Blue, Judge, &c. Recorded May 11, 1841, 6 A. M.

There is now attached to the page on which this registry is made a writing of which the following is a copy: "Whereas I, Wm. Hall, of Lambertville, &c., did, on the first day of May last, execute a mortgage with bond and warrant of Attorney to Hugh B. Ely, administrator, &c., of the estate of Dr. John Wilson, deceased, for the payment of \$2,000 on the 1st day of April next, with lawful interest. Now know ye who it may concern, that the said sum of \$2,000 was omitted being inserted in the said mortgage. I do hereby certify that the said sum of \$2,000 should have been so inserted; and I desire that it may not lose its effect by the omission. Witness my hand, &c., June 28th, 1841.

W. HALL, [L. s.]

THOS. J. SHREEVE, witness present.

On the 29th Jan., 1844, Wm. Hall gave a bond to Gershom Lambert, the complainant, for \$3,307.37; and to secure this bond the said Wm. Hall and Catharine his wife, on the same

day, executed and delivered to the complainant a mortgage, of that date, on the same premises described in the said writing purporting to be a mortgage from the said Wm. Hall and wife to the said Hugh B. Ely.

On the 1st May, 1841, the said Wm. Hall and wife executed and delivered to Robert Ely, Smith Ely and others, a mortgage of the same premises to secure \$2,000 ; which was recorded prior to the complainant's mortgage, and which has been assigned to Tunis Huff.

On 10th June, 1841, the said Wm. Hall and wife executed and delivered to Samuel W. Hall a mortgage of the same premises, to secure \$3,300, which was recorded June 11, 1841.

On the 29th December, 1842, the said Wm. Hall and wife executed and delivered to Sam'l D. Stryker and Jas. D. Stryker a mortgage of the same premises, to secure \$2,000 ; which was recorded prior to complainant's mortgage.

After the execution and recording of the complainant's mortgage, several judgments at law were recovered against the said Wm. Hall ; by virtue of which and of executions issued thereon, the mortgaged premises were sold by the sheriff of Hunterdon to Jas. N. Reading and Hugh B. Ely, and conveyed by him to them.

Gershom Lambert exhibited his bill to foreclose his said mortgage given by Wm. Hall and wife to him on the 29th January, 1844, making Wm. Hall and his wife, Samuel W. Hall, Tunis Huff, Sam'l D. Stryker, Jas. D. Stryker, Jas. N. Reading and Hugh B. Ely defendants.

The bill states that the said mortgage to Hugh B. Ely, recorded May 11, 1841, was written on a printed blank, and does not contain any sum of money to be secured thereby, nor any time of payment ; and that the registry thereof contains no sum of money to be secured thereby, nor time of payment. That the complainant, or his agent who transacted the business of his mortgage for him, previous to the execution of his mortgage examined the records of mortgages for Hunterdon, for the purpose of ascertaining what incumbrances there were on the said premises, and found that the record of said Ely's mortgage was as above stated ; and being advised by his counsel that the said record was not according to the provisions of the statute

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in such case made and provided, and that said mortgage was not an incumbrance on the premises, he was induced to lend to the said Hall the said sum of \$3,307.37, and take his said mortgage as security therefor. The bill charges, that the said Ely's mortgage, though, as the complainant insists, it was no incumbrance, was paid off by Sam'l W. Hall, who is an uncle of the said Wm. Hall, and by the said Ely given up or transferred to the said Sam'l W. Hall. It appears clearly from the testimony taken in the cause, that the mortgage from Wm. Hall and wife to the complainant was not given to secure any money then lent or advanced, but to secure a precedent debt.

[The Chancellor then recites the evidence of Jos. Besson, Hugh B. Ely and Asher Lambert. And speaking of Lambert, the Chancellor goes on to say:]

This witness, in his cross-examination, after stating that he inquired of Besson for how much the Ely mortgage was given and the answer he got, and that he informed his father that he found such a mortgage on the record, says: "Neither of us took any advice before we took our mortgage. The reason was, I looked at the law relating to mortgages which says that the mortgage shall specify the amount of the mortgage money; and I judged from that. I informed my father what the law was about it." The 5th section of our statute, entitled "An Act to register mortgages," enacts, that every mortgage shall be void against a subsequent judgment creditor or bona fide purchaser or mortgagee *not having notice thereof*, unless acknowledged or proved and recorded, &c.

If a subsequent mortgagee has actual notice of a prior mortgage, his mortgage will be postponed to that prior mortgage, though that be not recorded.

I am of opinion, clearly, from the evidence, that the complainant is chargeable with actual notice that Wm. Hall had given a mortgage to Hugh B. Ely before he, the complainant, took his mortgage, independent of the certificate appended to the record of the Ely mortgage.

The complainant did not know or discover that the Ely mort-

gage was in blank as to sum till it was found to be so by his son in searching the records. The complainant advanced no money for the mortgage given to him. Hall proposed to give it to secure an old debt he owed the complainant, and the complainant could have no objection to taking it. He had full notice of the Ely mortgage, *if it be a mortgage*, i. e. he had notice of the paper as it actually was.

The bill charges that the mortgage to Hugh B. Ely was paid off by Sam'l W. Hall, an uncle of the mortgagor, Wm. Hall, and by the said Ely given up or transferred to him.

The bond and mortgage from Wm. Hall and wife to Ely were exhibited in the cause. There is no assignment of them, or either of them, to Sam'l W. Hall or any other person. The indorsements of payments on this bond are as follows, viz :

[\$800] Received, May 6, 1844, of Samuel W. Hall, eight hundred dollars on account of this bond.

H. B. ELY, *Adm'r.*

[\$665] Received, May 21, 1844, of Sam'l W. Hall, six hundred and sixty-five dollars on account of this bond.

H. B. ELY, *Adm'r.*

[\$929,09] Received, April 21, 1845, nine hundred and twenty-nine dollars and nine cents, balance in full on this bond.

H. B. ELY, *Adm'r.*

In response to the charge in the bill that the Hugh B. Ely mortgage has been paid, &c., the answer of Sam'l W. Hall says, "He admits he is an uncle of Wm. Hall, and that in May, 1844, he purchased of Ely the said bond and mortgage so given by his nephew, and that he has paid to Ely the full amount of the said bond, principal and interest. That the said bond and mortgage has been given up and transferred to him by the said Ely, and that he now holds the same as his own property. The answer then proceeds thus : "And this defendant further says, that the said bond and mortgage in his hands are in no wise paid off or satisfied to him by the said Wm. Hall or any other

person. That the payments indorsed on the said bond as made by him to Ely were not made or received in extinguishment of the said bond, but as evidence that the consideration for the purchase money of the same was fully paid and satisfied by this defendant, who had become the purchaser and owner of the said bond and mortgage in good faith. And he submits that the said mortgage is a valid outstanding incumbrance upon the said premises, and is in equity entitled to be paid out of the same." He admits that on the 10th of June, 1841, Wm. Hall and wife executed to him a mortgage on the premises for \$3,300, which was registered on the 11th of May, 1841, and which he alleges is an outstanding and valid mortgage. Hugh B. Ely, in his principal examination, says, he sold his mortgage to Sam'l W. Hall. In his cross-examination he says, "At the time I sold the mortgage to Sam'l W. Hall he came to me and said he wanted to pay off that mortgage, or that he was going to make a payment; he wanted to take up that mortgage. He did not wish any receipt on his bond, but wished a loose receipt; and when he made the last payment he gave up the loose receipts and I gave him the bond and mortgage. My impression is that I did not assign the mortgage." Examined in chief again, he says:

"I do not remember the language used by Sam'l W. Hall, when he came to pay me money on the mortgage, I do not know what understanding there was between William and Samuel W. Hall as to paying off this mortgage. There was nothing said by Sam'l W. Hall from which I could infer that this mortgage was to be cancelled or that it was not to be cancelled. My impression was that Sam'l W. Hall, in taking up this mortgage, intended to take my place. This I gathered from the whole transaction, and not from anything in particular said at the time by Samuel W. Hall. There was a great deal said at the time which I cannot now particularly remember. At this time I wanted my money on the mortgage, and so had informed Wm. Hall.

Again cross-examined. He says, "when Sam'l W. Hall came there about this mortgage, I can't pretend to state the language he used, but I understood from him that he came to take up or pay off this mortgage. He first, perhaps, asked me if I did

not hold such a mortgage against Wm. Hall, and said he had some money by him, and would pay that, and would have some more by and by and come over and pay it. He then said he would take loose receipts, and not have it receipted on the bond. This is all I recollect being said on this subject. Sam'l W. Hall did not tell me his views in this transaction; but I thought his object was to take my place.

In Chief Again. When I use the words "pay or take up the mortgage," being the words attributed to Sam'l. W. Hall, I did not understand that the mortgage was to be canceled. There was nothing said like it or about it. My impression was that Sam'l W. Hall was going to take my place, but not from anything he said, that I can recollect.

The peculiarity of the answer of Sam'l W. Hall, in answer to the charge that this mortgage had been paid off, and the testimony of Ely on that part of the case, connected with the fact that the mortgage is receipted in full, the indorsement of the last payment in full not even mentioning by whom it was made, and no assignment of the bond and mortgage or either of them being made to Sam'l W. Hall, presents a case so singular, so utterly varient from the course which would naturally have been pursued by one intending to buy a mortgage and hold it as an existing instrument and lien, that I am constrained to say that, in my opinion, no such intention existed. No man of common prudence, intending to buy a mortgage, would pursue such a course. Again, the mortgage was in blank as to sum; no amount of money was mentioned in it. Can it be believed that any man about to invest money, his own money, unless he was otherwise secured for it, would not only run the risk of buying a mortgage blank as to sum, but would buy it without taking an assignment of it, or of the bond; and that, too, though there were payments indorsed on the bond, the last of which indorsements was a general receipt in full, without stating by whose hands the money was paid, and therefore carrying the presumption that it was paid by the obligor himself? The indorsements made by Ely on the bond, particularly the last, shows that it was his understanding that the mortgage was paid off; and this is more consistent with his testi-

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mony as to what passed between him and Sam'l W. Hall than any other version of it.

A man is not at liberty to put a court to guess that he had a meaning different from what the facts fairly show according to all the rules of dealing between men of ordinary prudence, and on such a guess to make out an affirmative case for him.

The court is asked to declare, under the facts above stated, that when this bond and mortgage was paid off and receipted in full, in the manner stated, and no assignment of them or either of them taken, Samuel W. Hall supposed and intended them to be, in his hands, subsisting instruments. I do not believe it. If he did, and loss accrues to him, it is fairly chargeable to his own folly or stupidity. To encourage such looseness and disregard for what prudence dictates to any man in reference to his rights and interests would fill the courts with controversies. True, it now appears, by the testimony in this cause, that the last money was also paid by him, or his hand; but this does not change the view taken as to his intention at the time. He paid it on the bond, and it was indorsed on the bond. The indorsement is of a general receipt in full of the balance due on the bond; and he took no assignment or anything else to show that he had any right or interest in the bond and mortgage. It can hardly be supposed that if he intended to keep this bond and mortgage alive, as securities for money of his own, he would have committed all his interest to the chance of proving by parol, at a future day, that the money indorsed as payment in full was paid by him.

This renders it unnecessary to consider in this suit, whether the writing given by Wm. Hall and wife to Hugh B. Ely, purporting to be a mortgage, is to be considered a mortgage, there being no sum mentioned in it. It is for the payment of (blank,) according to the condition of a certain bond, dated May 1, 1841, given by Wm. Hall to Hugh B. Ely, payable on the 1st day of April next ensuing the date of said bond, with interest. I am inclined to think it should be considered a mortgage to secure the sum mentioned in that bond. The sum can be ascertained from the bond.

For the purposes of this suit, the Hugh B. Ely mortgage will be declared to be postponed to all the other mortgages

It is possible that something may have occurred which might induce the Court to consider this bond and mortgage as still an existing security, in the hands of Samuel W. Hall, as against the purchasers at the Sheriff's sale. Sam'l W. Hall and the said purchasers are defendants in this cause ; but their respective rights, as between them, could not well be submitted or adjudged in it. I am willing that, if the property shall sell for more than the other mortgages, the surplus be brought into court, that the right to it, or enough of it to meet the Hugh B. Ely mortgage, may be contested between Sam'l W. Hall and the said purchasers.

I had gone thus far, when, at Dec. term, 1847, without reading the above, I stated to counsel that I was willing to hear any further testimony they might obtain, and which might throw light upon the question whether the bond and mortgage must not be considered as paid, or whether, in the present shape of the papers, the bond and mortgage are to be considered as subsisting instruments.

One further deposition has since been put in on the part of the defendant, Samuel W. Hall. It is that of Samuel Hall, a nephew of defendant and brother of Wm. Hall.

[The Chancellor here recites in full the testimony of Samuel Hall, and proceeds as follows:]

So much of this deposition as may be considered testimony, and not the impressions or opinions of the witness, is : he knows of Samuel W. Hall getting a bond and mortgage from Ely. That Samuel W. Hall paid to Mr. Ely the amount of principal and interest due on the bond and mortgage, in three payments. Wm. Hall came and applied to his uncle to get the money to settle up this bond and mortgage. Nothing was said about the sum not being mentioned in the mortgage when William asked his uncle to pay it off. Mr. Hall, [Sam'l W. Hall] said he would pay it off from time to time as he could get the money. The rest of the deposition, (except as hereinafter noticed,) consists of impressions or inferences of the witness, as follows : he (Samuel W. Hall,) took that mortgage in preference to taking a new one, because it was the first mortgage. His uncle took

the bond and mortgage from Mr. Ely as security for the money which he had advanced for William Hall. He took it as security for the money, holding the property liable to him for the money. He meant to take up the bond and mortgage for himself. Such expressions as these can have no influence. The fact that the bond was indorsed as paid in full, the last indorsement not stating by whom that payment was made, is of itself much stronger than any such impressions or opinions of the witness. The remaining parts of this deposition to be noticed are as follows: witness was there the last time when his uncle took up the bond and mortgage. It was spoken then about an assignment on the bond and mortgage; but Mr. Ely did not think it was necessary to make an assignment on them. Mr. Ely thought the face of the bond would be enough at any time to show he had paid the money. He thought his holding of it would be sufficient, and that it would not require an assignment.

Wm. Ely, in his testimony, says, that when Samuel W. Hall came to him he said he wanted to pay off the mortgage, or that he was going to make a payment, he wanted to take up the mortgage. There was nothing said by Samuel W. Hall from which he could infer that the mortgage was to be canceled or that it was not to be canceled. When Samuel Hall came, witness understood from him that he came to take up and pay off the mortgage. He said he had some money by him, he would pay that, and he would have some more by and by, and come over and pay it. This is all he recollects being said on the subject. Samuel W. Hall did not tell him his views on the transaction.

The transaction as actually carried out was consistent with the language used by Samuel W. Hall: the payments were indorsed on the bond and the bond receipted in full.

It is difficult to imagine that, if Samuel W. Hall intended to become the assignee of the bond and mortgage, he would have allowed the bond to be receipted in full; and quite as difficult to imagine that, if an assignment was spoken of, in such a way as to give Mr. Ely the idea that Samuel W. Hall intended to become the assignee of the bond and mortgage and to hold them as subsisting securities, Mr. Ely should have thought that

the indorsing of the bond as paid in full would make him such assignee.

Mr. Ely states no such thing in his testimony: and Samuel W. Hall in his answer makes no such pretension.

There is but a single remark in the testimony of Samuel Hall going to show that Samuel W. Hall said one word that indicated an intention of getting these papers in such way as to hold them as subsisting securities; and this does not occur in the principal examination of this witness, and the witness fixes it, too, at the first time they went to Ely's. The witness says, that his uncle said to Mr. Ely, the first time they were there, that he would take the bond and mortgage as security for the money he would advance. Mr. Ely makes no statement that he intended to take an assignment of the mortgage; or that he was ignorant that an assignment was necessary; or that he supposed that indorsing the bond paid by him was sufficient to put him in the position of an assignee. Indeed, the last indorsement does not even show that the money thereby credited on the bond, and paying it in full, was paid by him. To make out the case now set up by or for the defendant Samuel W. Hall, if the case really was as now contended, for the purpose of overcoming the strong, not to say plenary proof, derived from the fact that the bond is indorsed paid in full, we should have had, I have no doubt, an entirely different answer. The case as now contended for could not exist without a degree of ignorance in both Samuel W. Hall and Ely, nay, in Samuel Hall too, which the court are not at liberty to presume. If the transaction was really intended to be an assignment, but took the shape it did from ignorance, the only way in which it could have happened, it would have been so stated in the answer of Samuel W. Hall. He does not put himself on this ground. Unless, therefore, we are at liberty, in the absence of any such ground taken in the answer, to presume that it was through ignorance, there is nothing to overcome the proof furnished by the indorsements themselves; for if we presume, or take it for granted, that either of these three men knew that an assignment was necessary, the payments would never have been indorsed on the bond.

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In the absence of any allegation of such ignorance, I cannot assume it ; but must give effect to the transaction as it appears upon the papers. It would be dangerous, when a bond, by indorsements, is shown to be absolutely paid, for a court to set it up as a subsisting obligation. What do the court know of the motives of the parties at the time of the transaction, arising from relationship or from the state of dealings between them ? Many reasons may have existed why this uncle may have been willing to pay the bond ; and dealings may have been had between him and his nephew since, founded on this very payment. Would the court be safe now, in giving to a transaction an entirely different character from what the parties, by their own acts at the time, gave it ? Safe in saying that a sum of money indorsed on a bond as a payment was no payment ? That a receipt in full on a bond was no payment ?

Could an action at law be brought on this bond, receipted in full ? I apprehend not.

Assumpsit might be brought for money paid at the request of Wm. Hall in discharge of his bond ; but the mortgage accompanying the bond would not be a subsisting incumbrance. The indorsements on the bond, in this case, are, in my judgment, stronger evidences of what was the intention of the parties than anything to be derived either from the answer or the testimony in the cause.

In this view of the case, I think it unnecessary to consider whether a writing purporting to be a mortgage, but which contains no sum of money nor time of payment is a mortgage. An abstract of this writing was recorded. The abstract was blank as to sum and time of payment. A person seeing such an abstract would learn that some such writing existed. He would not know whether the omitting to fill the blank was a mistake of the recording clerk, or whether the writing itself, in the possession of the party holding it was blank. If we suppose the abstract sufficient to put him upon inquiry, and suppose him to have inquired and found that the writing itself was blank, and that the omission to fill the blank was a mistake in the execution of the mortgage, what is the effect ? Or if he makes no inquiry, but the writing is in fact blank, in which case notice, if we sup-

pose such an abstract or record sufficient to put him on inquiry, would be according to the fact, that is, notice of a mortgage blank as to sum, what is the effect? Is such a blank writing and the recorded abstract of such a blank writing a valid mortgage for the sum that was intended to be put in the mortgage?

Our "Act to register mortgages" provides, that the recording clerk shall enter the names of the mortgagor and mortgagee, the date of the mortgage, the mortgage money and when payable, and the description of the lands mortgaged. And a supplement to the said act provides, that every mortgage shall be void against a subsequent judgment creditor or bona fide purchaser or mortgagee for a valuable consideration not having notice thereof, unless such mortgage shall be acknowledged, or proved, and recorded.

Under these sections, is the record of an abstract, without sum, of a writing purporting to be a mortgage, which in truth has no sum, notice of a mortgage for any sum whatever?

The question is new, and perhaps there are difficulties in it. It is not the case of a mistake in the recording clerk. It is a case of oversight in the party taking the mortgage.

It, perhaps, would be considered his own laches, of a character from which a court might not feel bound or disposed to relieve him by any strained view of equity. On the other hand, it may be said that by inquiring of the holder he might learn that the mortgage was to secure a bond of even date with the mortgage and between the same parties, and that the bond contained the sum. Still the question recurs, is it a mortgage? It might on a bill in equity between the parties be established as a mortgage; but is it a mortgage as against a subsequent mortgagee taking a mortgage before it is established in equity?

I have not found it necessary in this case to decide this question.

The Ely mortgage will be postponed to the complainant's mortgage and to the other mortgage.

Decree accordingly.

JOHN BLACK, JOSEPH SMITH and BENJAMIN JONES vs. JAMES
SHREEVE and others.

A., B., C. and others were constituted a body corporate, with a certain capital, to be divided into shares, and authorized to construct a rail or McAdamized road. A loan becoming necessary to complete the road, it was resolved, at a meeting of the Directors and stockholders, that the Company should borrow a certain sum. The money could not be borrowed on the credit of the Company, and A., B. and C. borrowed the money on their individual credit, and advanced it as a loan to the Company; and the Company, to secure the repayment thereof, with interest, executed to A., B. and C. an obligation conditioned for the payment of said sum in five years, with interest semi-annually, and a mortgage of all the lands contained within the bounds of their road as located, graded, &c., and all the materials of which said road was constructed, and the appendages thereof, and all dividends, proceeds and profits which might thereafter be declared or accrue from the use of the road. And the Company, by a clause in the mortgage, covenanted that the proceeds and profits arising from the road should be applied, in the first place, at the end of each half year from the date of the mortgage, to the payment of the half year's interest. And in order to indemnify A., B. and C. against more than their proportionate part of any loss that might accrue by reason of any insufficiency of the mortgaged property to pay the sum so loaned, certain other stockholders of the Company, together with A., B. and C., entered into an agreement under seal, by which the said other stockholders agreed with A., B. and C. that if the mortgaged property should be insufficient to pay the said sum and interest, so that any loss or deficiency should happen, each of them, and each of the said A., B. and C. should bear an equal portion of such loss or deficiency; and that if any of them should, before or at the time such loss or deficiency should be ascertained, become or be unable to pay his proportionate share thereof, then, such of them as should remain solvent and able should sustain such loss equally with the said A., B. and C. And they further covenanted and agreed to and with the said A., B. and C., that if the mortgaged property should prove insufficient to pay said sum and interest, so that a loss or deficiency should happen, then they, their executors, &c., would forthwith pay such sum to A., B. and C., their executors, &c., as would divide said loss or deficiency equally between such of them as remain solvent at the time such loss or deficiency should be ascertained; and that the said A., B. and C. severally, should bear an equal part of such loss.

The mortgage becoming payable and remaining unpaid, A., B. and C. filed their foreclosure bill, and obtained a decree for the sale of the mortgaged property; and it was sold by the Sheriff. The amount of the sales was insufficient to pay the mortgage; and the amount of the deficiency was ascertained by and on the day of the sale. A., B. and C. filed their bill, charging, that certain of the parties to the said agreement (naming them) were, at the time when such deficiency was ascertained, unable to pay their respective portions thereof; and that certain other parties to the said agreement (naming them) remained and were solvent and able to pay their respective proportions of such deficiency, and were the only parties to the said agreement, other than the complainants, that remained and were solvent and able

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as aforesaid ; and these last named persons only were made defendants in the bill. The bill prayed that the defendants might discover whether they were solvent and able to pay their respective proportions of the deficiency, or any part and how much of their said proportions ; and that they might be decreed to bear the said loss and deficiency equally with the complainants : and that if it should appear by the said discovery, or otherwise, that at the time when said deficiency was ascertained any or either of the defendants was unable to pay his proportion, then, that such of the defendants as then were solvent and able might be decreed to pay to the complainants their respective proportions of the deficiency.

The construction of the agreement was held to be, that the loss which should accrue, either from the deficiency of the mortgaged premises or from inability in any of the parties to the agreement to pay their full proportion of the deficiency, should be borne equally by such of the parties to the agreement as should be able to bear an equal proportion of such whole loss with each of the complainants ; and that, therefore, all the parties to the agreement, other than the complainants, should have been made parties defendants, in the bill.

If, upon the true construction of an agreement set out in the bill, subscribers to it who are not made defendants should have been made defendants, the defect of parties may be taken advantage of by demurrer, though the complainant, in his bill, has put a construction on the agreement which would make it unnecessary to make such subscribers defendants.

Held, that the complexity of the said agreement, and the multiplicity of suits it might give rise to at law. were grounds on which a court of equity might entertain a bill for the adjustment of the contribution called for by the agreement in one suit.

One of the subscribers to the said agreement had died, after the amount of the deficiency was ascertained, leaving a will of which C., D. and E. were appointed executors. C., in his individual capacity, was a complainant on the bill, and D. and E., the other two of the said executors, were made defendants as such executors.

Held, that it was not necessary that C. should be made a defendant as one of the said executors.

A demurrer can only be founded on a fact or omission appearing in the bill. It cannot set up a fact or omission not appearing in the bill and thereupon demur.

Held, that the terms of the said mortgage required a sale under it of whatever could be sold under it; and that such sale and the proceeds of it fixed the amount of the deficiency.

On the 11th of June, 1846, John Black, Joseph Smith and Benj. Jones exhibited their bill stating that on the 11th Feb., 1833, the Legislature of this State passed an act entitled "An act to incorporate the Delaware and Jobston rail or McAdamized road Co.," by the 1st sec. of which it was enacted, that the said John Black, &c., should be a body corporate, &c., and be capable of holding and conveying real or personal estate, &c. That by the 2d sec. of said act it was enacted, that the capital stock of the corporation should be \$60,000, with liberty to increase it to \$200,000, and should be divided into shares of \$50

each. And by the 5th section, that five directors should form a board, who, or a majority of them, should be competent to transact the business of the corporation, and make by-laws, rules, and regulations, respecting the management of the stock and property of the Co. That by the 6th section, the corporation was authorized to survey, lay out, construct and repair a rail or McAdamized road from the river Del., at the mouth of Craft's creek, to the vicinity of New Lisbon, following the route in said act designated; with liberty, nevertheless, given by the 17th sec. of said act to alter such parts of said route as the Co. might deem proper, subject in said alteration to the restrictions in that section mentioned. And, by the 15th section, that said act should be deemed and taken to be a public act. That the stock was subscribed and apportioned, and on the 3d June, 1833, directors were chosen, and the Co. duly organized and proceeded to effect the object of their incorporation by surveying, laying out and constructing a railroad in accordance with the provisions of the act. That on or about Jan. 21, 1834, the Legislature passed a supplement to the act; by the 5th sec. of which supplement it was enacted, that the said Co. should thereafter be known by the name of "The Delaware and Atlantic Railroad Company." That numerous difficulties and embarrassments impeded and oppressed the Co. in the construction of their said road; the most important of which was the inadequacy of its funds and the deficiency of means within its control for the prosecution of such a work; which difficulties increased until on or about Jan. 7, 1835, when a general meeting of the directors and stockholders was held, upon due notice, for the purpose of examining into the affairs of the Co., and the state of the road, and devising means to extricate the Co. from its embarrassments and to complete the road. That at said meeting, which was numerously attended, and at which the complainants Black and Smith were present, the complainant Jones being absent, a statement of the affairs of the Co. was submitted to the meeting, by which it appeared that on the 30th Dec., 1834, the debts and liabilities of the Co., including \$9,772.06, being the sum estimated by the engineers of the Co. to be necessary to complete the road, amounted to \$52,822.13;

which debts and liabilities consisted of \$4000, borrowed from the Philadelphia bank; \$2000 borrowed from the Buck's bank, Pa., and \$500 borrowed from the Farmers' bank of New Jersey, and a large sum due to various individuals for lands, materials, work and labor, and money borrowed; among which last sums \$1240.09 was due to Andrew M. Jones; \$12,417.75 to Messrs. A. and G. Ralston; \$1724 to R. S. Johnson, and \$96.75 to Daniel White; together with large sums of money due and owing to each of the complainants. That at the same meeting an examination of the state of the road was made, by which it appeared that it was embanked, excavated and graded from the Delaware to the head of Lisbon pond, and that the iron and other rails were laid upon the road a part of the distance between the points aforesaid; but that a considerable part of the road between said points was still without iron rails, and that none were in the possession of the Co., and that \$9772 would be required for the purchase of said rails, and for the other expenditures necessary to complete the said road, so as to fulfil the object for which its construction had been undertaken, and to enable the Co. to derive from it a revenue.

That from said statement of the affairs of the Co., it further appeared that the receipts of the Co. up to Dec. 30, 1834, amounted as the complainants have been informed and believe, to \$58,823.80, including sundry loans made to the Co., by banks and individuals, a part of which was still unpaid, as above stated, and including \$44015, being the whole amount realized up to that date from the stock of the Co. subscribed and taken, though the subscriptions read the sum of \$60,050, and though all the instalments had been called for and required, a number of the stockholders having failed to pay, in whole or in part, the sums due from them. That by the said statement it further appeared that, out of the said \$58,823.80, so received by the Co., disbursements had been made up to the said date, for and on account of the Co., and for and on account of the road, to the amount of \$56,569.59; leaving in the treasury at that date \$2,254.20; while its road was unfinished and the Co. embarrassed with numerous and heavy debts; that payments to the amount of \$52,822.13 must be made by the Co.

before the road could be completed and the Co. relieved from its debts and liabilities; and that the only means the Co. had or could resort to for the payment of the said \$52,822.13 was the said balance of \$2,254.29, and the further sum of \$16,035, due from the stockholders as aforesaid; so that even if the last sum was promptly paid, there would still be a deficiency of \$34,532 for the payment of its debts and liabilities, and the completion of the road.

That from the said statement it became apparent to the directors and stockholders attending the meeting that a new loan must be made, or that the road must be left in its unfinished state, and the money already paid by the stockholders be sunk. That urged by these considerations, it was resolved and determined by the directors of the Co., and by the stockholders assembled at said meeting, that the Co. should borrow \$35,000. That a committee consisting of Chalkly Atkinson and the complainants Black and Jones, were appointed to negotiate the said loan for and on the credit of the Company. That a knowledge of the embarrassment of the Co., and of the unfinished state of the road generally existed, and in consequence the efforts of the said committee to borrow the said \$35,000 on the credit of the Co. and pledge of the road were unavailing, and that the committee so reported to a second general meeting of the directors and stockholders of the Co., held on the 23d of the same month of January. That numerous attempts were afterwards made by and on behalf of the Co. to procure the said loan, but without success. That the stockholders in arrears as aforesaid, either from inability or disinclination, failed to pay up their arrearages, and the small balance aforesaid in the treasury was rapidly diminishing under the necessary current expenditures of the Co., and the times of payment of several of the heaviest loans already made by the Co. were rapidly approaching, and, if not paid at maturity, it was apparent that the credit of the Co. already shaken, would be entirely prostrated. That at this crisis in the affairs of the Co., the complainants were induced, by an offer of the securities hereinafter stated, and more especially by the offer of the covenant or agreement hereinafter set forth, to borrow upon their credit the said \$35,000 and

advance it as a loan to and for the use of the Co.; and the said sum was so borrowed by the complainants and was lent, upon the faith of the said securities, by the complainants, to and for the use of the Co.

That, in order to secure to the complainants the repayment of the said \$35,000, with the interest that might accrue thereon, the Co. executed and delivered to the complainants a bond or obligation, by order of the Co. and of the directors thereof, sealed with the seal of the Co., and signed by Thomas Haynes, then secretary of the Co., dated Feb. 2, 1835, conditioned for the payment to the complainants of the said sum of \$35,000, in five years, with interest thereon semi-annually.

That in order to secure the payment of said bond the said Co. executed and delivered to the complainants a mortgage, by order as aforesaid, and sealed and signed as aforesaid, bearing even date with the said bond, by which the Co. mortgaged to the complainants all the lands contained within the bounds of their said railroad, as at the last mentioned date actually located, graded, excavated and embanked from the Delaware river to the head of New Lisbon pond, and all the materials of which the said road was constructed, and the appendages thereof, and all dividends, proceeds and profits which might thereafter be declared, grow due or become payable from the use of the said road, together with the hereditaments and appurtenances thereunto belonging; and all the estate, right, title, &c., of the said Co. of, in or to the same. And that said Co., in and by the said mortgage, did covenant and agree to and with the complainants, that the proceeds and profits arising from the road should be applied, in the first place, at the end of each half year from the date of said mortgage, to the payment of the half year's interest which should be then due on said \$35,000; before any dividend of such proceeds and profits should be made among the stockholders, and that no dividend of such proceeds and profits should at any time thereafter be made before the said debt of \$35,000 should be fully paid, until all interest due upon the said sum of \$35,000 at the time of declaring such dividend should be satisfied, and then a dividend of such part of said proceeds and profits only as might remain after

the payment of all interest then accrued upon the said debt of \$35,000 should be declared among the stockholders.

That in order to indemnify the complainants against more than a proportionate part of any loss that might arise in consequence of the corporate property so mortgaged to the complainants proving insufficient to pay the sum so loaned by the complainants to the Company, and in consequence of an agreement to that effect, made and entered into between the parties hereinafter next mentioned, previous to the consent of the complainants to loan the said sum to the Company, and upon the faith and security of which said agreement the complainants were mainly induced to make the said loan, James Shreeve, Clayton G. Atkinson, Chalkley Atkinson, Jon. Smith. Timothy Field, Thomas Haines, Jon. Scattergood, Richard Jones, Philip R. Dakin, Thos. Black, Jacob Ridgway, Restore S. Lamb, Jas. Newbold, John B. Bispham, John Chambers, Jos. Burr, Nathan Atkinson, Amzi B. Wood, together with the complainants, all being stockholders of the Company, did execute, enter into and deliver a covenant or agreement, dated Feb. 2, 1835, as follows (it is given at length): "To all, &c., we (giving the names last above mentioned, to and including the name of Amzi B. Wood,) send greeting." It then recites that the Company have borrowed of John Black, Jos. Smith and Benjamin Jones, also stockholders in the Company, \$35,000, to be applied towards completing the road and its appendages; and that the Company had given their bond and mortgage (stating the terms of the mortgage) to the said Black, Smith and Jones, bearing even date with these presents; and that they whose names are subscribed and seals affixed have agreed with the said Black, Smith and Jones, that in case the corporate property so mortgaged should prove insufficient to pay the said sum and its interest, so that a loss or deficiency should happen, that in such event each of them and each of the said Black, Smith and Jones, should bear an equal portion of such loss or deficiency. And that in the event that any of them who had signed this instrument should, before or at the time such loss or deficiency shall be ascertained, become or be unable to pay his proportion of such loss or deficiency, that in such case such of them as remain solvent and able shall bear and

sustain such loss equally with the said Black, Smith and Jones, that is to say, each of them who remain solvent to bear an equal part thereof with each of them the said Black, Smith and Jones, and then provides that, in order to confirm said agreement and give it legal operation, they whose names are thereto subscribed and seals affixed do covenant and agree to and with the said Black, Smith and Jones, that in case the said corporate property so mortgaged to said Black, Smith and Jones should prove insufficient to pay said sum and interest, so that a loss or deficiency should happen, then they, their executors, &c., should and would forthwith pay such sum to said Black, Smith and Jones, their executors, &c., as will divide said loss or deficiency equally between such of them as remain solvent at the time such loss or deficiency is ascertained and the said Black, Smith and Jones, that is to say, each of the said several individuals is to bear an equal part of such loss.

That it was upon the faith and security of the said covenant that the complainants were induced to make said loan of \$35,000 to the Company, and that without it the said loan could not have been obtained from them.

That the said loan afforded but temporary relief to the Company, and that, on or about May 28, 1836, as the complainants have been informed and believe, the Company executed and delivered a certain other mortgage on the said railroad, premises and property, as well as upon other premises and property not so mortgaged, to the said Thomas Black, James Newbold and Jon. Smith, to secure \$14,165.04, or some other sum; and that numerous judgments were recovered by different individuals against the said Company, in the Supreme Court and in the Common Pleas of Burlington.

That, the principal and interest of the complainants' said mortgage remaining unpaid, except the sum of \$1,067.50 paid in 1835 on account of interest, the complainants, in January, 1844, filed their bill of foreclosure on their said mortgage; and such proceedings were thereupon had that, in July, 1844, a decree was made for the sale of the said railroad, lands and premises mentioned in the complainants' said mortgage, and all the materials of which the said the road was constructed, and the

appurtenances and appendages thereto and thereof, and all dividends, proceeds and profits of the said road, and all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to raise and satisfy \$53,765.83, the amount reported by the Master to be due on the said mortgage, with interest thereon from the date of said decree, with the complainants' costs; and that a *fi. fa.* issue, &c. That a *fi. fa.* was issued accordingly, returnable to the April term, 1845. That the Sheriff, after having advertised, &c., and after making one adjournment, on the 2d of June, 1845, sold the said railroad, lands, premises, materials, dividends, proceeds and profits, with the appendages, and all and singular the hereditaments and appurtenances thereunto belonging. That the Sheriff, in the first place, set up and exposed to sale the dividends, proceeds and profits above mentioned; and Richard Jones, a defendant to this bill, bid for the same \$117.31, and the said dividends, proceeds and profits were struck off to him for that sum; and that the Sheriff, in the second place, exposed to sale the said railroad, land, premises and materials, with the appendages, and the hereditaments and appurtenances thereunto belonging, and the said Richard Jones having bid therefor \$1,000, the same were struck off to him for that sum; and that, after deducting, &c., there remained, on the said 2d day of June, \$54,522.89. That the loss and deficiency and the amount thereof were ascertained on the said 2d of June, 1845. The bill then states the death of James Newbold and Jon. Smith, parties to the said covenant, and makes their representatives parties. That said Newbold died before said 2d of June, 1845, and Jon. Smith died after that day. That on the said 2d of June, when the said loss and deficiency were ascertained, the parties to the said covenant, other than the complainants, who then remained and were solvent and able, and the estates of such of the said other parties who had died previous thereto which remained solvent and able, became and were and still are liable and bound to bear and sustain the said loss and deficiency equally with the complainants.

That upon the solvency and ability of the said other parties and estates depends their liability to the complainants and their obligation to pay the complainants their several proportions

of said loss or deficiency, and the amount of the proportions to be paid depends on the number of the said other parties and estates remaining solvent and able. That the solvency and ability of a party or an estate to pay a specified sum at any given time, except in extreme and notorious cases, is a fact exclusively in the knowledge of the party himself, or of the representatives of such estate, and is not capable of proof by any other party without a discovery from such party himself or such representatives.

The bill charges that on the said 2d of June, and for a long time before, Thomas Haynes, Timothy Field, Jon. Scattergood, Clayton G. Atkinson, Chalkley Atkinson and John B. Bispham, parties to the said covenant, had severally become and were notoriously unable to pay their respective proportions of the said loss and deficiency; and that Philip R. Dakin, Jacob Ridgway, Jos. Burr and Amzi B. Wood and other parties to the said covenant, had died before said 2d of June, and that on that day their respective estates were notoriously unable to pay their respective proportions of said loss and deficiency. That the complainants have been informed and believe, and therefore charge the fact to be, and that the same will appear by a discovery from the defendants hereto, that, on the said 2d of June, James Shreeve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson and Thos. Black, other parties to the said covenant, and other defendants hereto, and the said Jon. Smith, another party to the said covenant, and whose executors or some of them are parties hereto, remained and were solvent and able to pay their respective proportions of said loss and deficiency, and that the estate of the said James Newbold, deceased, and the said administrators thereof, remained and were able to pay the proportion of the said loss to be borne by the said James Newbold; and that, on the said 2d of June, the said James Shreeve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thos. Black and Jon. Smith, as well as the estate of the said James Newbold, deceased, and the said administrators thereof, remained and were solvent and able to pay to the complainants such a sum of money as would divide the said loss and deficiency equally between the said parties to the said covenant and said estates remaining solvent and able as aforesaid

and the complainants; and that each of them was able to bear an equal part of said loss and deficiency with each of the complainants. And the bill charges that, on the said 2d of June, the said Jas. Shreeve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thos. Black and Jonathan Smith were the only parties to the said covenant, other than the complainants, then living that remained, and were solvent and able as aforesaid, and that the estate of the said James Newbold, deceased, was the only one of the estates of the parties thereto, who were dead that remained and was solvent and able as aforesaid; and that they, therefore, on the said 2d of June, became and were each liable to pay the complainants such a sum of money as would divide the said loss and deficiency equally between the last mentioned persons and estate and the complainants.

That the whole of said loss and deficiency remains unsatisfied and, after deducting therefrom the sum of \$14,877.95, the part or proportion thereof to be borne and sustained by the complainants, there remains \$39,674.94 which, with the interest thereon from said 2d June, is now due and payable to the complainants from and by the said James Shreeve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thos. Black and the estate of the said James Newbold and the said administrators thereof, and the estate of the said Jon. Smith and the said executors thereof; that is to say, an equal proportion from each.

That whether the said last mentioned persons and estates were, on the said 2d of June, solvent and able, as aforesaid, are facts exclusively within the knowledge of said persons and of the said representatives of said estates; of which proof cannot be made by the complainants; and that they are advised that they cannot safely proceed in any action, either at law or in equity, to recover, &c., without a discovery from the said last mentioned persons and representatives, respectively, whether, on the said 2d of June, they were able to pay their respective proportions of said loss and deficiency, and such sums as would divide the said loss and deficiency equally between said last mentioned persons and estates and the complainants.

That they have frequently and in a friendly manner applied, &c.

The bill prays that the defendants, and each of them may set forth and discover whether, on the said 2d of June, the said Jas. Shreeve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thos. Black and Jon. Smith were solvent and able to pay their respective proportions of said deficiency, or how much of their said proportions they were able to pay; and the same as to the estate of Newbold; and that each of the said defendants may be decreed to bear and sustain the said loss and deficiency equally with the complainants; and that an account may be taken of what is due and owing to the complainants upon the said covenant; and that the defendants may be decreed to pay, &c.; or, if it shall appear by the said discovery, or otherwise, that on the said 2d of June any or either of said defendants James Shreeve, &c., or Jon. Smith, since deceased, or the estate of said Jas. Newbold, who was then dead, were unable to pay his or its equal proportion of said deficiency, that then such of said defendants and estates as then were solvent and able may be decreed to pay to the complainants the amount due them as aforesaid, each paying an equal proportion; and for further relief.

James Smith, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thos. Black, James Shreeve and Barclay White, Executors, &c., of Jon. Smith, dec'd, and Caleb Newbold, Jr., and Richard C. Shreeve, Administrators, &c., of Jas. Newbold, dec'd, are the persons made defendants.

To this bill a demurrer was filed by all the defendants; and for causes of demurrer they say,

1st, That the other parties to the said covenant, naming them, ought to have been made defendants.

2d, That Jas. Smith, one of the Executors of Jon. Smith, ought to have been made a defendant.

3d, That the bill does not state who nor how many of the stockholders or directors of the Company were present at the alleged meetings of said stockholders on the 9th and 23d of Jan'y, 1835, when it was resolved to negotiate said loan; nor what authority those who were present had to resolve to negotiate said loan.

4th, That the bill does not state that the directors and stock-

holders, or either of them, had notice of said meeting on the 23d Jan'y, 1835.

5th, That the said covenant set out in the bill is only in aid of the mortgage, and the mortgaged premises, which were the primary fund for the payment of the loan ; and that it does not appear that the mortgaged property has first been legally and rightfully applied to the payment of said loan.

6th, That the said Company, in and by the mortgage aforesaid, (to which the said covenant was collateral,) covenanted that the proceeds and profits arising from said railroad should be applied, at the end of each half year from the date of the mortgage, to the payment of the interest on said loan, as appears by the bill, and it is not shewn or stated by the bill that such appropriations were made.

7th, That on the matters stated in the bill the complainants had a full and effectual remedy at law.

8th, That the complainants have not in their bill shewn any sufficient matter of equity to entitle them to the relief sought by the bill against these defendants.

W. L. Dayton and P. D. Vroom, in support of the demurrer. They cited 16 *Ves.* 326 ; 6 *Mad.* 113 ; 2 *Dick.* 738 ; 3 *Atk.* 406 ; 2 *Railway Cases* 756 ; *Ang. & Ames on Corp.* 340 ; 13 *Serg. & Rawle* 210.

R. D. Spencer and W. Halsted, contra. They cited 1 *Green's Ch.* 288 ; 1 *Story's Eq.* sec. 33, 478, 483, 496, 7 ; 14 *Ves.* 164 ; *Platt on Cov.* 117 ; 2 *Bos. & Pul.* 268, 272 ; *Story's Eq.* sec. 469, 477, 492, 3, *Ib.* sec. 71, 67, note 4, 69, note 1 ; 1 *Jac. & Walk.* 234 ; 2 *Chan. Ca.* 200 ; *Story's Eq.* sec. 730, 850 ; 6 *John. Ch.* 398, 401, 405, 408 ; *Story's Eq. Pl.* sec. 237, 452, note 3 ; *Edw. on Parties*, page 3, sec. 1 ; *Jeremy's Mitford*, 280, 1 ; 3 *Cranch* 220 ; *Welford on Eq. Pl.* 69 ; 10 *Simons* 79 ; 2 *Dick.* 738 ; 3 *Atk.* 406, 341 ; 16 *Ves.* 326 ; 1 *Paige* 384 ; *Story's Eq. Pl.* sec. 447, 8 ; *Stephens on Pl.* 344, 5 ; 4 *Day's Rep.* 323 ; 2 *Halst. Rep.* 98 ; 1 *Gall.* 94 ; 2 *H. Bl.* 125 ; 4 *Iredell's Ch.* 107 ; *Rev. Stat.* 136, sec. 20 ; 11 *Conn. Rep.* 112 ; 4 *Harr. & McHen.* 21 ; 1 *A. K. Marsh.* 469 ; 1 *Coxe's*

Black v. Shreeve.

Cas. 321; 1 *Rand. Rep.* 332, 328; 1 *Eq. Ca. Ab.* 113, *Pl.* 1, 5; 2 *Hill's Ch.* 210; 10 *Gill & John.* 65, 103; 2 *Vern.* 103; 4 *John. Ch.* 334, 7.

THE CHANCELLOR. The question proper to be first considered is, what is the true construction of the covenant as to whether any of the covenanters who may be unable to pay the whole of his proportion of the loss or deficiency is to be absolved altogether from paying anything, or is liable to pay so much of his proportion as he may able to pay.

The instrument recites, that the subscribers to it have agreed with the complainants that, if the property mortgaged shall prove insufficient to pay the sum loaned, so that a loss or deficiency shall happen, each of them and each of the complainants shall bear an equal portion of such loss or deficiency; and that in case any of them shall, before or at the time when such loss or deficiency shall be ascertained, become or be unable to pay his proportion of such loss or deficiency, then, such of them as remain solvent and able shall bear such loss equally with each of the complainants. And the parties to the instrument then covenant that, if a loss or deficiency shall happen, they will pay to the complainants such sum as will divide said loss or deficiency, equally, between such of them as remain solvent at the time such loss or deficiency is ascertained and each of the complainants. It is shortly this: they recite that they have agreed that each of them shall pay an equal portion of the loss or deficiency with each of the complainants; and that if any of them shall, at the time when such loss or deficiency shall be ascertained, be unable to pay his proportion of such loss or deficiency, then such of them as remain solvent and able shall bear such loss equally with each of the complainants; and then covenant that if a loss or deficiency happen they will pay to the complainants such sum as will divide said loss or deficiency, equally, between such of them as remain solvent and each of the complainants. I cannot think that it was the intention of this instrument that if, when the loss or deficiency should be ascertained, one of the parties should be able to pay nine-tenths of his proportion of the loss, he should pay nothing at all if he was unable to pay

also the remaining tenth. Nor do I think that the language of the instrument requires such a construction. It seems to me that the true construction of the instrument, as a whole, is, that the loss which shall arise, either from the deficiency of the mortgaged premises or from inability in any of the parties who subscribe the instrument to pay their full proportion of such deficiency, shall be borne equally by such of the subscribers as shall be able to bear an equal proportion of such whole loss with each of the complainants.

The other construction contended for would, it appears to me, be so unreasonable, and so difficult, I may say almost impossible to be carried out, that it is difficult to imagine that it could have been the sense of the parties. Why should not a party able to pay a half, or other proportion of his share of the loss, pay it. And how would it be possible to ascertain that a party able to pay nine-tenths of his proportion of the deficiency was not able to pay the other tenth. Could it possibly be done in any other way than by suing him for his proportion of the deficiency, and selling his property on judgment and execution. And can it be that, if on such a sale his property, by reason of a slender attendance of bidders, should bring a tenth less than the amount of the judgment, the product of the sale would belong to the defendant in judgment? A jury might, from the testimony before them, believe that one of these parties had property sufficient to pay the whole of his proportion and give a verdict accordingly, and yet, on a sale on the judgment and execution, the proceeds of the sale of that property might fall short; in which case, the sale would show that the verdict and judgment were wrong, and that the sale should never have been made. Again, it is contended that the construction of the instrument is, that if any of the subscribers to it should not be able to pay his whole portion at the time the deficiency should be ascertained he should pay nothing. Now, how on the trial of a suit against one for his share of the deficiency, had, it may be, several years after the deficiency had been ascertained, would it be possible to show whether the defendant was able or not at the time the deficiency was ascertained? But, suppose he was able then, and was found so to be, and judgment was obtained against him

and execution issued, and on the sale of his property the proceeds fell short of paying his proportion. What then? The verdict and judgment may be right and must be taken to be so, for he may have been able at the time the deficiency was ascertained, and that was the point of inquiry on the trial. Must not the sum raised by the sale, though less than his proportion of the deficiency, be paid in such case, on account of his share of the deficiency?

Here then would be a case in which, though a part only of one's proportion of the deficiency should be raised, it would be required to be paid, though he could not pay the whole. Again, suppose one at the time of the trial, should be abundantly able to pay his full proportion of the deficiency, and should set up that, though able at the time of the trial, he was not able at the time when the deficiency was ascertained, how would it be possible to settle such a question as that; and does the instrument really mean that such a defense might be set up.

I think the construction contended for on the part of the complainants cannot be the true one; but that the construction I have above suggested is the true construction. If I am right in this, it follows, that all the subscribers to the instrument should have been made parties defendants.

Is there any reason founded on the frame of the bill why the demurrer for want of parties should not be allowed? There is no allegation in the bill that such of the said subscribers as are not made defendants were, at the time when the deficiency was ascertained, or are now insolvent. The allegation is, that Thomas Haynes and other of the said subscribers, (naming them,) on the 2d of June, 1845, the time stated in the bill as the time when the deficiency was ascertained, had become and were unable to pay their respective proportions of such deficiency. They may, notwithstanding such allegation, each of them have been able to pay more or less of their respective proportions of the deficiency. We have, then, an instrument set out at length in the bill, which (as is now thought), requires every subscriber able to pay any part of his proportion of the deficiency to be made a party. The complainants in the bill put a construction on the instrument which

they suppose relieves them from the necessity of making any subscriber a party unless he was able to pay all his proportion ; and the bill is demurred to for want of parties. Does the demurrer admit the correctness of the complainants' construction of the instrument ? I apprehend not. If upon the true construction of an instrument set out in the bill, subscribers to it who are not made defendants should have been made defendants, the defect of parties may be taken advantage of by demurrer, though the complainant in his bill has put a construction on the instrument which would make it unnecessary to make such subscribers defendants. The construction I have given to the instrument as to the liability of the subscribers to it, that is, that each was liable for such part of his proportion of the deficiency as he was able to pay, notwithstanding his inability to pay the whole of his proportion, disposes, I think of two other of the causes of demurrer assigned, namely, that the complainants have a full and effectual remedy at law ; and that they have shown by their bill no sufficient matter of equity to entitle them to relief in this court.

As to these causes of demurrer, I think a little reflection will shew that the demurrer cannot be sustained for either of them. If the plaintiffs are put to proceed at law, they must adopt one of two courses ; either sue each of the covenanters for his share of the deficiency, and proceed to judgment and execution, and in that way ascertain whether each is able to pay his proportion of the deficiency ; in which case, if it turn out that one is unable to pay, a new set of suits against such as are able would be necessary, in order to recover from each one who is able, his aliquot part of the loss arising from the inability of any ; and this might go on *ad infinitum*, so to speak ; for if, in the second set of suits, one of the defendants should be unable to pay his proportion of such last mentioned loss, a third set of suits would be necessary against such as remained able, for their aliquot part of the loss arising from this last mentioned failure ; and so on ; or else the complainants must take the course of suing such only of the covenanters as they may think they can show are the only ones able to pay anything, and rely on proving to the satisfaction of each jury the total liability of all who are not sued to pay anything at all, according to my construction of the covenant, or their ina-

bility to pay the whole of their respective proportions of the deficiency, though able to pay a part of it, on the complainant's construction of the covenant; a more difficult matter still; and if one of the juries should not be satisfied of the total inability of any one not sued, or of his inability to pay all his portion though able to pay a part of it, according as the construction of the contract may be, and should therefore, by their verdict, fix a different ratio of contribution, the recoveries in all the other cases would be wrong in amount.

It seems to me that the complexity of this covenant, and the multiplicity of suits, and the successive sets of suits it might give rise to at law, are grounds on which this court may properly entertain a bill for the adjustment of the contribution called for by the covenant in one suit.

Another cause of demurrer assigned is, that Joseph Smith, one of the executors of Jonathan Smith, deceased, ought to have been made a party defendant. Joseph Smith is one of the complainants, one of the three persons who made the loan to the Co., and who are seeking by this their bill, from the covenanters, the proportions of the respective covenanters of the sum borrowed. Jonathan Smith, since dec'd, was one of the covenanters, and bound to contribute his proportion of the deficiency. Jonathan Smith died after the 2d of June, 1845, the day on which the bill states the amount of the deficiency to have been ascertained, leaving a will of which he appointed James Shreeve, Barclay White and the said Joseph Smith, executors. Joseph Smith in his individual capacity, is a complainant in the bill, and James Shreeve and Barclay White, the other two executors of the will of Jonathan Smith, are made defendants as such executors. The objection is, that Joseph Smith is not made a defendant as one of the executors of the will of Jonathan Smith. It is clear that a man cannot in his individual capacity sue himself in his capacity as executor. Can he in his individual capacity sue himself and two others as executors of a will; or can he, because he is joined in his individual capacity with two other complainants, suing in their individual capacity, make himself as executor, either alone or with other executors of the same will, a defendant in the suit in which he in his individual capacity is a

co-complainant. I think not. He cannot at the same time and in the same suit act both against and for the estate. In this bill he is seeking a decree against the estate; and the two other executors of the estate are made defendants. This is all that is required and all that can be proper. Another cause of demurrer assigned is, that the Co., in and by the mortgage given by the Co., to secure the payment of the money loaned by the complainants, (the covenant being to secure to the complainants such portion of the loan as the mortgaged premises might be insufficient to pay,) covenanted that the proceeds and profits arising from the railroad should be applied, at the end of each half year from the date of the mortgage, to the payment of the interest, and that it is not shown or stated by the bill that such appropriation was made.

To this it may be answered, first: if there were any proceeds and profits to be applied to the payment of the interest, it was as much the business of the covenanters as of the complainants to see that the company so applied them; the covenanters and the complainants being all members of the same company or corporation. But again, it does not appear by the bill that there were any proceeds and profits which were not appropriated. A demurrer can only be founded on a fact or omission appearing in the bill. It cannot set up a fact or omission not appearing in the bill and thereupon demur.

Another cause of demurrer assigned is, that the covenant set out in the bill as made by these defendants is only in aid of the mortgage and the mortgaged premises; that said mortgaged property is the primary fund for the payment of the said loan; and that it does not appear that said mortgaged property has first been legally and rightfully applied to the payment of said loan. The meaning of this I suppose to be, that all the property mortgaged to secure the loan has not been sold or otherwise applied for that purpose, (I do not suppose that the words "legally and rightfully" can extend the idea beyond this,) and that, inasmuch as the covenant provides only for the payment of the deficiency after the mortgaged property, i. e., all the mortgaged property has been applied, the deficiency contemplated and to be provided for cannot be known until all the mortgaged property is ap-

plied. And I think this the correct idea resulting from the nature of the covenant. Certainly the complainants could not, after selling and applying half the property mortgaged towards paying the loan, stop there and call on the covenanters for the difference between the proceeds of half the mortgaged property and the amount of the loan, as the deficiency contemplated. If the bill showed that state of things, it would be demurrable.

The question then is, have the mortgagees by their proceedings on the mortgage applied all the mortgaged property towards the payment of the money loaned?

What was mortgaged? The language of the mortgage is, all the lands contained within the bounds of said railroad as at the date of the mortgage actually located, graded, excavated and embanked from the Delaware river to the head of New Lisbon pond, and all the materials of which said road was constructed, and the appendages thereof, and all dividends, proceeds and profits which might thereafter be declared, grow due or become payable from the use of the said road. It is a mortgage of the road and the materials of which it was constructed and all dividends, proceeds and profits to be declared, grow due or become payable from the use of the road.

Can it be supposed that this language extends the mortgage to dividends, proceeds and profits which might be declared, grow due or become payable from the use of the road, after the road and the materials of which it was constructed should be sold under the mortgage?

It is said that the sale under the mortgage passed nothing to the purchaser except such lands, if any, as were outside of the road; that the charter provides that the road shall be a public highway; that the purchaser under the mortgage did not take the franchises; that the Co. could not mortgage the franchises; that the purchaser could not remove the rails; that the mortgage and the foreclosure of it could not affect the public; that the Co. had the right or franchise of charging tolls, and the public had the right to travel; that the purchaser could take neither the franchise, nor the road, nor the materials of which it was constructed; that the decree on this mortgage should have been for the sequestra-

tion of the tolls ; that this is the only kind of decree that could be taken on this mortgage.

On the other side it is admitted, that the franchises were not mortgaged or intended to be, and that they could not be ; and it is said, that if the franchises were not mortgaged, then they could not be sold under this mortgage ; and if the complainants have sold all that was intended to be mortgaged the covenant takes hold ; that the bill states distinctly that all the property mortgaged was sold, and the demurrer admits it ; that if the road remains, and the franchises, then the Company still have them ; that there is a power in the charter to convey any real or personal estate ; that this has been held in our Court of Chancery to include a power to mortgage ; that it does not appear by the bill that there are any tolls ; that sequestration could only be of the surplus after repairs ; and that it would destroy the Company to sequester the tolls, leaving nothing for expenses and repairs.

The bond was payable at a specified time, at the expiration of five years ; and the Company mortgaged the lands, &c., and dividends, &c., to secure the payment of the bond ; and the covenanters covenanted to pay the deficiency after the application of the mortgaged premises. This shows that the parties acted on the idea that the Company could mortgage something, and that the property the Company could mortgage was such that it could be sold at the expiration of the mortgage, and the amount of the deficiency ascertained. This excludes the possibility of their contemplating a sequestration of tolls ; for if under this mortgage tolls were to be sequestered, the amount of the deficiency to be paid by the complainants could never be ascertained. If it be necessary under this mortgage to go into a sequestration of tolls, then, inasmuch as tolls will be receivable as long as the Company and road exist, the primary fund could never be exhausted.

I am satisfied that the parties contemplated a sale under the mortgage of whatever could be sold under it, and that such sale and the proceeds of it should fix the deficiency to be made up by the covenanters.

Any mistake that may have been made at the sale as to what

the purchaser would get on a sale under this mortgage, if any such mistake was made, cannot enter into our present inquiry.

I think that the only cause of demurrer that is sustainable is that for want of parties.

CASES IN CHANCERY.

MARCH TERM, 1849

SARAH VAN GIESON *vs.* GEORGE W. HOWARD and wife,
and others.

A. devised real estate to his widow for life, and ordered it to be sold after her death, and the proceeds to be equally divided among the children of his brothers and sisters. A. had three brothers and one sister. Two of his nephews and one of his nieces had died before the making of the will, leaving issue.

Held, that such issue were not entitled to any share.

One of the nieces died after the testator's death, and in the lifetime of the widow, leaving a will by which she devised her interest.

Held, that she had a devisable interest.

Hillyer, for complainant.

Robert Van Arsdale, for the defendants.

THE CHANCELLOR. Garret Doremus, of Caldwell, in the county of Essex, died April 18, 1818, leaving a will by which after making several devises and bequests, he devises as follows: "I give and bequeath to my loving wife the use of all the remainder and residue of my real estate during her natural life, to make use of as she shall think best and proper for her support; and after her death I do order that all my real estate be sold, and the money arising from the sale thereof I give, and my will is that it be equally divided between my brothers' and sister's children and Rynier Van Gieson, in equal portions, share and share alike."

The testator had one sister and three brothers. Two of his

nephews and one of his nieces had died before the making of the will, leaving issue.

Rachel, one of his nieces, and wife of Garret Egberts, died in 1826, after the testator's death, leaving two children, viz: Sarah, wife of Abraham Earl, and Ann, wife of George Howard; and leaving a will, providing, among other things, as follows: "I give and bequeath to my daughter Sally Earl all my rights and interests in a legacy devised to me by Garret Doremus, deceased."

The widow of the testator, Garret Doremus, died in 1843; and the executor named in his said will died without making sale of any part of the said residue of the testator's real estate.

The bill was filed by Sarah Van Gieson, daughter of the testator's sister, for the appointment of trustees or commissioners to make sale of the lands and divide the proceeds of the sale among such persons as should be adjudged by the court to be entitled thereto.

By consent of the solicitors of the parties, commissioners were appointed to sell the lands, who sold the same accordingly, and have the proceeds in their hands ready for distribution under the order of the court.

The questions which have been submitted are—1st, whether the issue of such of the testator's nephews and nieces as died before the making of the will are entitled to any share of the proceeds of the sale. I think they are not. Our statute, Rev. Stat. 369, sec. 22, provides, that when any estate shall be devised or bequeathed to any person being a child or other descendant of the testator, and such devisee or legatee shall die during the life of the testator, leaving a child or children, or a descendant or descendants of a child or children, who shall survive the testator, such devise or legacy shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants of such devisee or legatee. This statute does not apply to this case. Nephews and nieces of a testator are not his descendants. Again, this statute was not passed until December, 1824.

2d. The other question submitted is, whether the testa-

Van Gieson v. Howard.

tor's niece, Rachel Egbert, who survived the testator, and died in the lifetime of the said widow, had an estate or interest in the said lands or the proceeds of the sale thereof, which she could dispose of by will I think she had.

ELLEN HAMILTON *vs.* ANGUS ROSS.

A. left his residence in New Jersey, and went to the city of New York on the 4th of June, 1846. On the 10th of June, 1846, a creditor of A. sued out an attachment, by virtue of which his property, real and personal, was attached. In January, 1848, the auditors under the attachment sold the house where A.'s family resided; and it was bought by B.; and in February following, B. brought ejectment. A.'s wife, or widow, if he was dead, filed a bill, stating grounds on which she believed he had met a violent death in New York, and claiming dower, and that B. could not dispossess her until he had assigned her dower; and obtained an injunction against the ejectment.

The answer stated facts upon which the defendant submitted that A. had absconded from his creditors, and that there was no sufficient ground on which to find that he was dead, seven years from his departure not having expired. The injunction was dissolved.

The bill filed August 22, 1848, states that, on or about June 4, 1846, the complainant's husband, Charles Hamilton, since deceased, was, as she believes, seized in fee of a certain house and lot in Perth Amboy. That on the said 4th of June, at about 5 A. M., the said Charles went to New York, carrying with him certain furniture which had been made by him, he being a cabinet maker, with the intent, as he said, to sell the same there and to return from there on that or the next day. That he carried no baggage whatever, leaving all his clothes at home, except what he wore, being the suit of clothes which he usually wore when going about his ordinary business; and told the complainant he was coming back as aforesaid; since which time she has never seen him, nor heard from him by letter or otherwise, directly or indirectly, nor obtained any information respecting him except as hereinafter mentioned.

That when on the wharf, about starting for New York, one George F. Trynor, a tailor residing in Perth Amboy, asked him, as he was going to New York, to match a certain piece of cloth which he then held in his hand and gave to him, in a certain store in New York; which the said Hamilton agreed to do. That the said Hamilton arrived in New York that day and was seen.

there that day by divers persons, who reported their having seen him to the complainant. That he called at the said store in New York to which he had promised the said Trynor to go, and produced said piece of cloth, and endeavored to match it. That, on the same day, he called on a person to whom he owed money and paid him, and conversed a short time with his foreman, in his store, and then started away, saying that he was going home to Amboy, and that the boat started at a certain hour, being a short time therefrom, and went away in the direction of the said boat; and that, from that time to this, the complainant has near nothing of him whatever, although she has made diligent search and inquiry for him everywhere, and in every manner she could devise.

That said Hamilton, as she is informed and believes, had in his possession when he went to New York as aforesaid about \$300; and that the said furniture which he carried away was worth about \$40. That on or about the 8th of said June, becoming alarmed by the long stay of her said husband, she went to New York and caused diligent search and inquiry, and made all in her own power; but without success. And that she inserted an advertisement in the newspaper "Sun," which was continued therein for three days, advertising for information concerning him; but that all her efforts have been abortive; and that she at this time knows no more of his fate than she did at first.

That within a few days after said Hamilton's disappearance, and on or about the 10th of said June, John Manning, survivor of Manning & Reckless, of Amboy, made affidavit, before a Justice of the Peace, that he verily believed that said Hamilton had absconded from his creditors, &c., and owed him a sum specified in said affidavit, being about \$90; whereupon an attachment was issued against said Hamilton; and on the next day the Sheriff, by virtue thereof, attached all the property, real and personal, of said Hamilton, consisting of his household furniture and the homestead lot of said Hamilton, with the back lot adjoining and two other lots of land of considerable value. That the complainant could not appear for her husband; and being thrown by his disappearance and, as she believes, death, upon her own re-

sources, she could not afford to employ counsel ; and was therefore obliged to let the attachment go on, and regard it as merely void. That the said attachment did go on ; and on the 8th of January, 1848, the auditors appointed therein sold the real estate of said Hamilton.

That the whole amount of debts due from said Hamilton, so far as the complainant knows, and so far as was produced against him, with interest to the date of the auditor's report, ~~about Feb. 20. 1847,~~ was only between \$1500 and \$1600, ~~as the complainant is informed.~~ That the property of said Hamilton, properly managed and fairly valued, was more than sufficient to pay his debts. That his house cost, as the complainant knows from the report of her said husband and vouchers, about \$1,090, and was only two months old, or thereabouts, at the time he disappeared ; and that the lot on which it stands cost him \$500, about June, 1845. That he owned another lot for which he gave \$175, and two other lots for which he gave \$125, seven or eight years before, and which were then worth more ; and that his household furniture, fairly valued, was worth at least \$500. That said Hamilton, at the time he disappeared, was in good credit, standing and repute for integrity and industry, perfectly regular in his habits and exemplary in his demeanor. That he was an affectionate and kind husband, and the father of four children, the eldest then ten years old, and the youngest two. That he was not, at the time of his disappearance, sued by any one or threatened with suit. That of the indebtedness afterwards proved against him, one amount, of \$300, and another of \$550, were secured by mortgages on his homestead, and no interest thereon was then payable ; while of the balance of his indebtedness \$250 was secured by a note yet having about three months to run ; nor was there any danger of his being unable to pay it. That the complainant believes and charges that her said husband is dead. That she is informed he was apt when in possession of money to exhibit it boastingly and imprudently, and that she believes and charges that, either by accident or design, said Hamilton, when in New York at the time aforesaid, died by violence ; and that his death and body were concealed by those

who, finding a considerable sum of money upon him, found it their interest to do so.

That on the said 8th January, 1848, the said homestead of said Hamilton, in which the complainant with his family have dwelt since his disappearance, was sold by the said auditors to Argus Ross, (the defendant,) of New York, for \$54, subject to said mortgages for \$850 ; and a deed therefor was given to him ; and that the said Ross, on the 25th of February then following, caused a declaration in ejectment to be served on the complainant as tenant of said premises, returnable to the March term of the Middlesex Circuit. That the complainant caused her appearance to be entered to the said action, and entered into the consent rule ; and the said cause is now noticed for trial on the 2d Tuesday in Sept. 1848. That if her said husband is dead, as she verily believes and submits she has good reason to believe, she is entitled to dower in the said premises, and the plaintiff in said ejectment is not entitled to recover possession against her until such dower is assigned her ; and moreover she insists that the said attachment and the sale under it are void if the said Hamilton was not in life at the time of the issuing of the attachment or if he died between the service of the writ and the judgment thereon ; and further that an attachment cannot lawfully issue when service of a summons can be legally effected ; which could have been done at the time of the service of the said attachment, the complainant and the family of said Hamilton then being resident in his said house, where, if he was then alive, a summons might have been served ; and therefore also, the complainant insists that the said attachment and all the proceedings thereon are void. But that she is advised by counsel that she will not be allowed to attack the validity of such attachment in a court of law, wherefore she is without remedy at law.

The bill prays that the complainant may be decreed to be entitled to her reasonable dower in the said premises ; and that the same may be assigned to her under the order of this Court ; and that the defendant may in the meantime be enjoined from prosecuting his said ejectment until he shall assign to her her said reasonable dower.

The answer admits that Hamilton was seized of the home-

stead and lots in the bill mentioned, and that on or about June 4, 1846, Hamilton went to New York, having in his possession about \$300 in cash and about \$40 worth of furniture, there to be sold; and was seen in New York by several persons; and since that day has not been heard of; and says the defendant does not know, nor has he been informed, except as is stated and conjectured in the bill, of the other circumstances in the bill alluded to in connection with Hamilton's leaving Amboy and going to and being in New York; but denies that such statements if true are sufficient to warrant the belief that he came to his death in New York by violence. The answer admits the proceedings in the attachment stated in the bill, and the sale to the defendant subject to the mortgages; and says the defendant is informed that the mortgages were executed by the complainant as well as by Hamilton.

The defendant admits that he has brought ejectment and that the complainant caused her appearance to be entered to the action and entered into the consent rule; and that the cause was noticed for trial as is stated in the bill; and says that the trial was postponed by the Court, at the instance of the complainant, on her affidavit, as this defendant is informed and believes, of the absence of a witness alleged in said affidavit to be material. He submits that whatever equities the complainant may have had in the premises should have been asserted and enforced by her at the first opportunity; and that the neglect to do so amounts to a waiver thereof. That he has been informed and believes that Hamilton's debts, as reported by the auditors, amounted to \$1808.16, including the mortgages; and that the whole proceeds of the sale of his estate, real and personal, in the hands of the auditors, exclusive of costs and expenses, was sufficient to pay only a part of his debts, and as he believes, not more than one third.

He says he knows nothing of the credit or of the general outward conduct and demeanor of Hamilton; but that from what he has since heard of his conduct, and from facts and circumstances stated in the bill, he has good right to believe and insist, that at the time Hamilton left Amboy he left with the dishonest intention of absconding from his creditors.

He says he has been informed by John Coultts, a respectable merchant of Amboy, and he believes it to be true, that about the time Hamilton left Amboy, either the same day or the evening before, he borrowed of said Coultts \$250 or thereabouts. And the defendant says he has been further informed, and believes it to be true, that about the same time, or shortly before, Hamilton made out or procured to be made out bills against persons owing him ; and in one or more instances for the purpose of getting ready money, offered to receive half the amount due.

He denies that Hamilton is dead ; and submits that until positive and direct evidence to the contrary be adduced, and before the expiration of seven years from the time he was last seen or heard from, said Hamilton is to be deemed and considered to all intents and purposes, and especially in matters relating to the said real and personal property, as still living.

The cause was heard on the bill and answer.

Blauvelt moved to dissolve the injunction. He cited Saxton 196 ; Rev. Stat. 781.

C. Parker Contra.

THE CHANCELLOR. The injunction will be dissolved. The question whether Hamilton is dead, or is to be deemed under the circumstances to be dead, may be tried quite as properly, and perhaps much more satisfactorily in the ejectment suit. Acting on this ground in dissolving the injunction, I forbear making any remarks as to sufficiency or insufficiency of the facts stated in the bill to show that Hamilton is dead.

Injunction dissolved.

PREROGATIVE COURT.

MARCH TERM, 1849.

Administrators of JAMES STEVENSON, appellants, and Executors of JOHN D. HART, respondents.

The Orphans' Court opened the accounts of Executors on an allegation of fraud or mistake, and determined that a certain sum, \$2,000, did not belong to the estate, and should not have been brought into the account by the Executors and struck it out, and also struck out a portion of the commissions. On appeal to the Prerogative Court, the decree of the Orphans' Court striking out the \$2,000 was reversed.

Held, that the commissions struck out might be restored.

James Stevenson and Simeon W. Philips were the Executors of the will of John D. Hart, deceased. Stevenson died; and, in 1843, after his death, the accounts of the said Executors were settled in the Orphans' Court of Hunterdon County. In that account the Executors were credited with \$2,000, being the amount of a bond and mortgage of Charles Welling, as per will of Israel Hart, deceased; and Stevenson's Administrators were allowed commissions to the amount of \$461.47; and Philips was allowed commissions to the amount of \$. In Nov., 1847, on the application of Aaron Hart, alleging himself interested in the estate, and alleging a mistake in the said account in crediting the executors with the said Welling bond and mortgage, and also in the allowance of commissions on the said sum of \$2,000; and on the allegation of the said Philips of error and mistake in the said account in the distribution of commissions between him and the administrators of his deceased co-executor, the Orphans' Court ordered that Philips, surviving

executor as aforesaid, and the administrators of the estate of the said Stevenson, deceased, show cause at the next term of the said court why the said account should not be opened and re-stated. And in the term of Feb'y, 1848, the said Orphans' Court ordered that the said account be opened for the correction of error alleged; saying, that it appeared to the court "that the said account is erroneous in allowing a credit of \$2,000 to the accountants, being the amount of a bond and mortgage of Charles Welling to that amount as per will of Israel Hart, deceased, for the benefit of his widow, Mary Hart, which is in fact no part of the estate of said John D. Hart, deceased, and therefore ought not to have credit for; and that the said account gives them commissions on this sum." The said court thereupon order, that the said account be corrected by deducting the said \$2,000 from the credit side of the account; and that commissions to the amount of \$361.47, instead of \$461.47, be allowed to the accountants, to be equally divided between Philips and the administrators of Stevenson; and that the Surrogate re-state the account accordingly. This order was made in the absence of the administrators of Stevenson and without proof of any notice to them, upon an order of the court that service of the said order to show cause be served on S. R. Hamilton; he protesting that he was not then proctor in the case.

The Surrogate's re-statement states the balance in the hands of the accountants at \$2,288.40; and then states that the above balance is a bond and mortgage of \$2,000 which is to be accounted for at the death of Mary Hart agreeably to the will of Israel Hart, which leaves a balance of \$288.40 to be distributed agreeably to the will of John D. Hart.

The administrators of Stevenson appealed to this Court from the said order of the Orphan's Court.

S. R. Hamilton and *Zabriskie*, for the appellants. They cited 1 *Zab. Rep.* 70; 1 *Spencer's Rep.* 125.

W. Halsted for the respondent. He cited 3 *Paige* 88; 2

Moll. 381 ; 4 *Paige* 473 ; 3 *Harr. Rep.* 59, 63, 67 ; 4 *Russell* 180 ; 1 *Hill* 76, 92 ; 7 *Halst. Rep.* 316 ; 18 *Wend.* 350.

THE ORDINARY. The statement of the Surrogate, at the foot of the account re-stated by him, is a credit to the accountants, in another form; of the bond and mortgage for \$2,000 ordered by the Orphans' Court to be struck from the credit side of the account; and it shows that this bond and mortgage must have been charged to the accountants in the inventory, and that they were, therefore, entitled to credit for it. But the order or decree of the Orphans' Court was, that the accountants ought not to have credit; and it was on that ground that the accounts were ordered to be opened.

Again, Stevenson, in his account book, charged himself with having received from Charles Welling \$2,979 00, and credits himself with having paid to Mary Hart \$1,500 and other sums, and to Elizabeth Hart several sums of money.

The decree of the Orphans' Court will be reversed; and an order will be made that the accounts be settled in this Court. This case does not raise the question whether the Orphans' Court can properly open the accounts of executors simply to readjust commissions, or the question whether this Court will entertain an appeal on the simple question of the amount of commissions, or of their apportionment between or among the executors. In this case the Orphans' Court opened the accounts upon an allegation of fraud or mistake in a credit to the accountants of the said \$2,000; and when that Court determined to strike out that credit on the ground, as it was determined, that the said \$2,000 did not belong to the estate, they reduced the commissions. If, on appeal to this Court, it be determined that the \$2,000 is a part of the estate to be accounted for by the accountants, and that the Orphans' Court were wrong in striking it out, it would follow, I think, as incidental, that this Court would say they were wrong in reducing the commissions. If by fraud or mistake in the account the sum on which commissions are allowed is wrong, and by the correction of the fraud or mistake on the opening of the account for that purpose that sum is

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varied, either by the Orphans' Court, or by this Court, on appeal, the commissions may also be varied, so far as the amount of the estate should in the particular case govern the amount of the commissions. This would be but a consequence of the variation of the sum on which commissions should be allowed.

Decree reversed.

CITED in *Anderson's Ex. v. Berry*, 2 *McCar.* 232. See *Runkle v. Gale*, *supra*.

CASES IN CHANCERY.

JUNE TERM, 1849.

ROBERT R. FREEMAN and others *vs.* PETER Z. ELMENDORF
and others.

In Feb. 1841, E. recovered a judgment against M. F. F., and issued a *fi. fa.*, which was levied on a farm and a house and lots as the property of M. F. F. R. R. F., a son of M. F. F., for himself, and as guardian of his infant children, filed a bill, stating, that the said M. F. F., in July, 1833, "by deed of bargain and sale sold and conveyed" to the said R. R. F., his heirs, &c., the said farm; and that, in Dec. 1837, the said M. F. F., "by a deed of bargain and sale sold and conveyed" to the said infants, their heirs, &c., the said house and lots; both which deeds the bill states were recorded May 25, 1846; and stating facts tending to support the validity of the deeds; and praying an injunction restraining E. from proceeding on his execution. The injunction was allowed. An answer was put in denying the *bona fides* of the deeds, and stating facts tending to show the want thereof, and denying their validity as against the judgment for that reason; and, also, denying their validity as against the judgment by reason of their not having been recorded within fifteen days.

The Chancellor said that both questions were properly triable at law, on ejectment by the purchaser under the execution; and that the judgment creditor should be permitted to proceed to a sale under his execution. The injunction was dissolved.

The bill, filed Feb. 1, 1849, by Robert R. Freeman, for himself, and by Sarah B. Freeman and Matthew F. Freeman, infants, by the said Robert R. Freeman, their father and next friend, states, that on the 23d Feb., 1841, Peter Z. Elmendorf recovered a judgment in the Supreme Court against Jas. S. Nevius, G. D. Wall and Matthew F. Freeman, the father of the said Robert R. Freeman, for \$4,566 damages and \$37.59 costs; by virtue of which an execution in the nature of a *testatum fi. fa. de bonis et terris* issued to the Sheriff of Middlesex. That the Sheriff levied on a large amount of real and some personal

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estate of M. F. Freeman, a defendant in said judgment; and that some time after, but when precisely the complainant does not know, the Sheriff also levied on a farm belonging to the complainant R. R. Freeman, containing 147 71-100 acres, and also on a house and lots of land belonging to the said Sarah and Matthew, complainants, infant children of the complainant R. R. Freeman.

That the said Matthew, the father of the complainants, on the 27th of July, 1833, by deed of bargain and sale sold and conveyed to the complainant, R. R. F., his heirs and assigns, all the farm and premises before mentioned, and in said deed particularly described as follows, (giving the description;) as by the said deed, duly acknowledged, and now in the possession of the said R. R. F. will appear; which deed was duly recorded on the 9th of May, 1846.

That the said Matthew F. Freeman, the grandfather of the said infants, on the 23d of Dec. 1837, by a deed of bargain and sale sold and conveyed to the said infants, their heirs and assigns, all the house, lots of land and premises before mentioned and in said deed described as follows, (giving the description;) as by the said deed, duly acknowledged, and now in the possession of complainants will appear; which deed was recorded on the 25th May, 1846.

The complainant Robert F. Freeman states, that although the consideration named in the said deed to him from his father is stated to be \$5 and natural affection, yet that his father had in his hands of the money of said complainant, at the time, about \$1,500, which this complainant agreed should be considered as satisfied and paid by his said father by and upon the execution of said deed; and that the balance of consideration for the said deed, and the whole consideration of the said deed made to the said infants, was the natural love and affection which the grantor bore to the complainant and the said infants, his grandchildren.

That at the time of the execution and delivery of the said two several deeds the said Matthew, the grantor, was, as the complainant is informed and believes and therefore charges, in independent circumstances, wholly unincumbered by debts, and the said property so conveyed was free and clear of all judgments, mortgages and liens.

That the complainant R. R. F., immediately after the said farm was conveyed to him as aforesaid, went into the possession thereof and resided thereon, using and enjoying the same as his own, until April 1, 1839, when, having previously leased the same to one Daniel S. Voorhees, the said Voorhees went into possession thereof as the tenant of this complainant; and that Voorhees continued to occupy the same as such tenant of this complainant, paying him the annual rent thereof, until last April, (April, 1848,) when this complainant rented the house to Melancthon F. Carman, and has since farmed the land himself; and the said sale by the said Matthew to this complainant, and the possession, occupancy and enjoyment of the said property, either by himself or his said tenants, has been known and notorious in the whole neighborhood from the time of the said conveyance to the present time. That at the time the said Matthew conveyed the said house and lots to the said infants he resided on the same, and continued to reside there, by this complainant's permission, until about two years ago, when this complainant took possession of it, and has ever since resided on it, his said children Sarah and Matthew living with him; and that the fact of the conveyance was generally known at the time, or soon after, in the neighborhood, and was often mentioned by both the grantor and the complainant in public and in private.

That, having very little knowledge of the law, he was not aware that it was necessary to have his said deed and the deed to his said children recorded, for any purpose except that of providing for the case of the loss of the title papers; and that in consequence of that fact he failed to have the said deeds recorded sooner; and that he was first informed of its importance when, about May 1, 1846, he applied to one Melancthon Mundy to loan him a sum of money on said farm.

That he is informed and believes that Elmendorf held, at the time he recovered said judgment, a mortgage upon a valuable mill property in Somerville as security for the same debt, given to him by John I. Gaston, who at that time held the title to said property in trust for the said Wall, Nevius and Freeman, for whose use the said money was originally borrowed.

That he is informed and believes that after the execution of the note on which said judgment was recovered, and which was secured by the said mortgage as aforesaid, the said Freeman sold and conveyed all his interest in the real estate to the improvement of which the said money was applied to one Robert Van Rensselaer, who assumed and undertook to pay the proportion of the said note due from the said Freeman as part consideration for said conveyance. That said Van Rensselaer failed to make such payment, and afterwards died insolvent, without having procured the said Freeman to be released from his liability on said note ; and that afterwards the said Elmendorf released the said mill property to the said Gaston, and that without any consideration, and thereby gave up the security which was, as this complainant is informed and believes, intended as a protection of his father and the other parties to the said note, and that without their knowledge or consent.

That, soon after the entry of the said judgment, Elmendorf caused an execution to be issued to the Sheriff of Somerset, who thereupon levied upon a valuable real estate of the said Matthew F. Freeman in that county ; that said Matthew, some time afterwards, sold the same, and thereupon, without any consideration from the purchaser, released the same from the lien of the said execution ; and that a part of the moneys due on said judgment was raised by the Sheriff by a sale of real estate of the said Nevius in that county, but the precise amount this complainant does not know.

That the said Sheriff of Middlesex, by virtue of the said testatum, *ft. fa.* placed in his hands as aforesaid, first levied on all the real and personal estate of the said Freeman, and at the time of said levy was, as this complainant is informed and believes and therefore charges, informed by the said Freeman that the said farm and house and lots were not his property, but had been sold and conveyed by him as aforesaid to the complainant and his infant children ; and the said Sheriff did not at that time levy on said farm and house and lots ; and this complainant was not aware until about a year ago, that any such levy had been made ; and that this complainant has not taken any steps in the matter before, under the hope that said Elmendorf would desist

from his attempt to hold this complainant's said property and the said house and lots liable on said judgment, or that the said execution would be satisfied from some other sources.

That he is informed and believes, and therefore charges, that said Freeman has made several payments on account of said judgment, but the particular amount of said payments he does not know ; and that about \$2,000 in all have been paid to Elmendorf on account of said judgment.

That among other property of said Freeman which was levied upon as aforesaid by the said Sheriff (of Middlesex) was a valuable real estate in Woodbridge, part of which has since been sold by said Freeman, for \$4,000, as this complainant has been informed and believes, and which was more than sufficient to pay the whole balance on said execution ; and which said property, on or about April 4, 1846, and before the sale thereof as aforesaid, Elmendorf released to the said Freeman from the lien of his said judgment and execution, as this complainant is informed and hopes to be able to prove, and that without any consideration or the payment at the time of any part of the said judgment, and without the knowledge of this complainant.

That Elmendorf resides in New Brunswick, only about five miles from this complainant's residence ; and from the fact that the sale and conveyance of the said farm to this complainant and the sale and conveyance of the said house and lots to the said infants, by the said Freeman, was generally known by the public in the neighborhood, and that the possession, occupancy and enjoyment of his said farm by this complainant or his tenants as aforesaid was open and notorious, this complainant has reason to believe, and he therefore charges, that the said Elmendorf well knew, at and before the recovery of his said judgment, and before he executed any of the before mentioned releases, that the said Freeman had sold and conveyed the said farm and the said house and lots, and that the same were the property of the complainants as aforesaid, and not of the said Freeman.

But whether he had or had not such knowledge the complainant insists that, said conveyances having been made *bona fide* and for a lawful consideration, long before the recovery of the said judgment, and at a time when the said Freeman

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was wholly unincumbered with debts and had no creditors to be affected by said conveyances, the said real estate so conveyed to this complainant and said infants are not liable to be sold to satisfy said judgment.

That the said sheriff of Middlesex has within a few days informed this complainant's father that he had received a notice of amercement from the attorney of Elmendorf in the said suit, and that he intended to advertise the said real estate of this complainant and the said infants, so levied on as aforesaid, as the property of said Freeman, for sale under the said execution, and that he intends to sell the same forthwith. The bill prays that the sheriff and Elmendorf may be enjoined from selling; and that the said property may be wholly released and discharged from the operation of said suit, execution and levy; and for such other and further relief, &c.

The injunction was allowed.

Elmendorf put in his separate answer. He says he does not know the value of the property levied upon, of his own knowledge, but recollects that said Freeman told him that the property he was in possession of was worth at least \$10,000; which was one inducement for this defendant to sign the release hereinafter mentioned.

He says that the sheriff levied upon the said farm and the said house and lots as the property of Freeman (the elder), as the levy shows.

That he has no knowledge or information in regard to the consideration of the said two deeds, except what is stated in said bill and what appears upon the face of the said deeds. That he doth not admit that the grantor had in his house at the date of said deed to R. R. F., or at any other time, about \$1500 or any other sum, which said R. R. Freeman agreed should be considered as satisfied and paid by his father by and upon the execution of said deed; and he leaves complainant to make such proof of the consideration as he shall be advised. But says he does not believe there was any money paid by said R. R. F. to his father, nor by the said infants or either of them, at the time of the execution of said deeds respectively.

That he does not know and does not believe, and therefore

does not admit, that Freeman was in independent circumstances, wholly unincumbered with debts at the time he conveyed said property to R. R. F., and at the time he conveyed to the said infants. That he has heard that about that time said Freeman was indebted, and that he had been associated or in some way connected in business, with some person at the South, or elsewhere, for whom he had incurred liability; and that he was apprehensive of losing money by him. That it may be true that at the time the said deeds were made the property therein described was free of all judgment, mortgages and liens; but he has no knowledge or information on the subject, except that from an examination of the records, which he subsequently made or caused to be made, he believes there were no judgments or mortgages on said property at the time of the execution of said deeds; but whether there were any other liens on the property at the time he is ignorant. That he is ignorant whether R. R. F., immediately after said farm was conveyed to him, went into the possession thereof and resided thereon, using and enjoying the same as his own until April 1, 1839; or whether he leased said premises to Daniel S. Voorhees; and whether Voorhees went into possession thereof as his tenant, and whether Voorhees continued to occupy the same as his tenant, and whether Voorhees paid any annual or other rent for the same, or whether the complainant rented the house to Mr. F. Carman, and whether he has since farmed the land himself, and whether the said sale by M. F. F. to the complainant, and the possession, occupancy and enjoyment of the said property either by himself or his said tenant has been known and notorious in the whole neighborhood from the time of said conveyance to the present time. He admits that at the time of said conveyance of said house and lots to the said infants the said M. F. F. resided on the same, and continued to reside there; but whether it was by the permission of the complainant or not he is ignorant. And he is ignorant whether the said complainant took possession of said house and lots about two years ago, or at any other time, and whether he has ever since resided on it; and whether the children of said R. R. F. reside with him; and whether the fact of the said conveyance was generally known at the time or soon after, and.

whether the same was often mentioned by said M. F. F. and the complainant, or either of them, in public or in private.

That it may be true that the complainant had little knowledge of the law, and was not aware that it was necessary to have said deeds recorded for any purpose except that mentioned in the bill, and that in consequence thereof he failed to have said deeds recorded until the time in the bill mentioned, and that he was first informed of its importance at the time mentioned in the bill; but that this defendant has no knowledge or information in regard to the same, and cannot therefore admit the same. And this defendant is informed and believes that the said deeds were not recorded until the said M. F. F. had become largely indebted in New York, and he became embarrassed in his affairs, and his creditors had taken strong measures against him and he became apprehensive that measures would be adopted to obtain his property in New Jersey.

This defendant insists that the said deeds not having been recorded until long after his judgment against said M. F. F. and this defendant having, at the time of the entry of his judgment, no knowledge, information or belief of the said deeds of conveyance, or either of them, the said deeds are wholly void as against him or his judgment; and that, whether the omission to record said deeds proceeded from ignorance or negligence, it cannot in any way affect the rights of this defendant under his said judgment.

He admits that when he recovered his said judgment he held a mortgage on a valuable mill property in Somerville as security for the same debt, given to him by J. I. Gaston and his wife, which, as he is informed and believes, the said Gaston held in trust for himself and said Wall, Nevius and M. F. F.; and which mortgage bears date July 26, 1838, and contained in it the following condition, (giving the condition which is, that if Nevius, Wall and M. F. F. shall pay to Elmendorf \$4,000, according to the tenor and condition of a note or obligation given by them to Elmendorf, dated September 1, 1837, which had become due May 1, 1838, drawing interest from the date thereof, the said mortgage and note should be void;) but which mortgage was unaccompanied by any bond from said Gaston to this defendant,

and was never recorded, as by the said mortgage, now in this defendant's possession, &c.

He further says, that at the time when Gaston executed the said mortgage to him Gaston stipulated with him that he should not place it on record until Gaston should apprise him it was necessary to put in on record for his security. And that he, relying on the promise of Gaston, and also having confidence in the ability of the makers of the said note, did not cause it to be recorded.

He says he does not know for what use the money mentioned in said note was borrowed; but he believes it was borrowed to pay off a judgment held against said mill property by one Janney Dawes, and which was an incumbrance thereon at the time said Wall, Nevius and M. F. F. purchased the same.

He admits that after the execution of said note which said mortgage was intended to secure, but which, for the reason aforesaid, it did not secure, the said M. Freeman sold and conveyed all his interest in the real estate so purchased by said Gaston, Nevius, Wall and Freeman to Van Rensselaer, who assumed and undertook to pay the portion of said note due from Freeman as part consideration of said conveyance, and that Van Rensselaer failed to make said payment, and afterwards died insolvent without having procured said Freeman to be released from his liability on said note. But this defendant has no knowledge, information or belief that the money loaned by this defendant on the said note was applied to the improvement of the said mill property, and therefore he denies the same. He denies that he released the said mill property to Gaston; and denies that he gave up the said mortgage, but says he still has said mortgage in his possession, uncanceled; but that, said mill property having been sold by said Gaston, and the said mortgage not having been recorded, this defendant considers it of no value or validity, and hereby offers, upon the payment to him of the amount due him on the said judgment, to assign and transfer the said mortgage to the complainant.

He admits that he caused a *fi. fa.* to be issued to the Sheriff of Somerset; who thereupon levied on a valuable real estate of M. F. F. in that county; but what was the value of it he

does not know, but he does not believe it was worth more than \$1,500; and he believes that the said M. F. F. sold the same; but he has no recollection and does not believe that he ever released the same from the lien of the said execution; but if he did, it was done at the earnest solicitation of the said M. F. F., because he was informed by the said M. F. F., and fully believed from his own examination of the records, that the residue of the property of the said M. F. F. subject to his judgment was abundantly sufficient to pay his judgment. He admits that a part of the money due on his judgment was raised from a sale of the real estate of Nevius, by the Sheriff of Somerset, under a decree of foreclosure; a surplus after paying said decree having been paid by the Sheriff to this defendant on his said judgment; which surplus amounted to \$964.60, and was credited on the judgment Oct. 8, 1842. He admits that the Sheriff of Middlesex, by virtue of said *testatum jf. fa.*, levied on the real and personal estate of said M. F. F.; but whether the Sheriff, when he so levied, was informed by said M. F. F. that the said house and lots were not his property but had been sold and conveyed by him as aforesaid, this defendant is ignorant, and therefore doth not admit. But he does not believe that the said Sheriff made more than one levy on the said property; and he grounds his belief upon the fact that the said Sheriff told him that he, the said Sheriff, did not believe that the said M. F. F., at the time the Sheriff called on him to get an inventory, had given up all his property to be levied on, for that he, the said Sheriff, upon examining the records of the Clerk's office of said county, found that said M. F. F. had not given up to the said Sheriff all his property to be levied upon. And this defendant believes that the said Sheriff did not make any levy on any real estate until after he had examined said records. And this defendant believes that said Sheriff of Middlesex made but one levy, because he has been informed by his counsel and believes that there is but one levy on the execution issued into Middlesex remaining on file.

He does not believe that the said M. F. F. told the Sheriff of Middlesex, at the time he made his said levy or at any time previous thereto, that he had sold the said farm and house and

lots to the complainant and his said infant children. But this defendant insists that whether said M. F. F. gave to the said Sheriff such information at the time of his said levy or not, cannot in any way affect or impair the lien of his judgment execution and levy.

He says he does not know whether the said Sheriff, at the time he made his levy on the real and personal estate of said M. F. F., levied on the said farm and house and lots; but he believes that the said Sheriff, in May, 1842, by virtue of an execution issued on said judgment, did levy on said farm and house and lots, as by reference to said levy will appear.

He says that the said Sheriff, in the execution of his duty under the said execution, acted according to his own discretion; and examined the records of the county himself, and made such levy or levies as he thought proper, without any particular instructions from this defendant.

He says he does not know whether the complainant was or was not aware until about a year ago that any such levy had been made; nor does he know why the complainant has not taken any steps in the matter before; and that he has no information on that subject other than what is derived from the bill; and therefore leaves the complainant, &c.

He admits several payments on the judgment; and that he received from M. F. F., on the 25th Nov. 1844, \$150, and on the 16th June, 1845, \$75, and on the 4th April, 1846, \$40.92. And he admits that other sums have been paid on account of said judgment; and that the whole amount of money received from all sources on account of said judgment is \$1,780.52.

He admits that among the property of the said M. F. F. levied on under the said execution was a valuable real estate in the township of Woodbridge, Middlesex county, part of which, as he is informed and believes, has been sold for \$4,000. And that this defendant on or about April 4, 1846, after, and not before the sale thereof by the said M. F. F., did release the said property to the said M. F. F. from the lien of said judgment and execution, in consideration of certain payments in said release mentioned and of the sum of \$1.

He denies that the said sum of \$4,000 was, at the time of the

said release, more than sufficient to pay the balance on said execution.

He says it may be true that the complainant did not know of the said release at the time it was made; but he has no knowledge or information on the subject, except what he derives from the bill, and therefore does not admit the same.

He admits that he now resides in New Brunswick, and about five miles from the residence of the complainant; but says that when the said judgment was recovered, and for a considerable time after, and when the said levy was made, he resided in Somerset, and about twenty miles distant from the residence of the complainant.

He says that before the entry of his judgment, and at that time and before he executed said release, he had no knowledge, information or belief, that the said M. F. F. had sold or conveyed the premises in the bill mentioned to the complainant or the said infants, or that the said farm and house and lots were the property of the complainants and not of the said M. F. F.

He further says he has no knowledge, information or belief, that at the time of the entry of his judgment the sale and conveyance of the said farm to the complainant, and of the said house and lots to the said infants was generally known to the public in the neighborhood.

That he has no knowledge or information whether at the time of the entry of his said judgment the possession, occupancy and enjoyment of the said farm so pretended to have been conveyed to the complainant was open and notorious by the complainant or his tenants; and this defendant does not believe the same.

That he was induced to make the said release to the said M. F. F. by the strong solicitations of said M. F. F. and his repeated assurances that the residue of his property levied upon under his said judgment was more than sufficient to pay the balance due on his said judgment; and that the said M. F. F., at the time he solicited him to make said release, did not intimate or inform or give this defendant to understand, in any way, that he had sold the said farm to the complainant, or that he had sold the said house and lots to the children of the complainant; but the impression received and left on the mind of this defendant at

the time of executing the said release, by the conversations and solicitations of the said M. F. F., was, that the said farm and house and lots still belonged to the said M. F. F., and were subject to the said judgment, execution and levy. That this impression was confirmed by the fact that this defendant, shortly previous to the making of the said release, searched the records of the county, and did not find there recorded any deed from the said M. F. F. to the complainants, or to the said infants, for any of the land mentioned in the bill.

He says that, though it may be true, and he believes it is, that there were no judgments against the said M. F. F. at the time the said deeds from M. F. F. to the complainant and said infants bear date, yet he does not admit that the same were made *bona fide* and for a lawful consideration, or at a time when the said M. F. F. was wholly unincumbered with debts and had no creditor to be affected by said conveyance. That, from the best information he can obtain on the subject, he believes that the said M. F. F. was indebted at the time of those conveyances. And, from the fact that the said deeds were not recorded until just after the said M. F. F. became largely indebted and got into serious embarrassment in regard to some moneyed transactions, in New York, which impaired his credit and character, and might have been the means of causing legal proceedings against his property in New Jersey, when connected with the fact that the grantees were the son and grandchildren of said M. F. F., who was a man well acquainted with business, this defendant has strong reason to doubt and does doubt, whether the said conveyances were *bona fide*.

He admits that he intends to cause the Sheriff to sell under his said execution and levy, and submits that the injunction should be dissolved.

A motion to dissolve the injunction was submitted without argument.

THE CHANCELLOR. Both the questions which are included in this case are proper for the law courts. The judgment creditor should be permitted to proceed to sell under his ex-

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ecution. On ejectment brought by the purchaser, the *bona fides* of the deeds, and the effect of our statute declaring deeds void against subsequent judgment creditors, &c. not having notice thereof unless recorded within fifteen days after their delivery. Rev. Stat. 643, Sec. 18, will be proper subjects of inquiry and decision. The complainants are in possession; and if their deeds are good as against the judgment, they will not be disturbed by the Sheriff's making a deed to any one else.

Injunction dissolved.

AFFIRMED 3 Hal. Ch. 655.

ANDREW CORRIGAN vs. THE TRENTON DELAWARE FALLS CO.

"The Trenton Delaware Falls Company," on the 2d of April, 1833, made two mortgages to the Trenton Bank, for moneys borrowed: one for \$4,000, and the other for \$6,700; and on the 22d May, 1834, the Bank recovered a judgment against the Company for \$6,000, other money loaned by the Bank. On the 1st October, 1835, there was due to the Bank for interest on the said mortgages and judgment \$2,034.75. On that day the Company proposed to the Bank that if the Bank would make them a further loan, sufficient to pay said arrears of interest and a principal sum due to S. C., the Company would assign to the Bank, as security for the same, the rents reserved on certain perpetual leases of water made by the Company. The Bank accepted the proposition; and the Company made their note to the Bank for the \$2,084.75, payable three days after date, for the said interest, and the Bank loaned to the Company the further sum of \$3,504, and took the note of the Company therefor, payable three days after date; with which sum the Company paid to S. C. the said principal sum due him; and the Company executed to the Bank an assignment (so called by the parties,) of three perpetual leases of water power made by the Company to certain individuals at certain stipulated rents to be paid by the lessees to the Company. The Company afterwards became insolvent; and Receivers were appointed; and in Feb. 1844, by virtue of a decree of the Court and an act of the Legislature, the Receivers sold the property and chartered rights and privileges of the Company free and clear of all incumbrance. The Bank afterwards transferred the said leases to the petitioners, and all rents due and to grow due thereon, and assigned them the said note of \$2,084.75.

Held, first, that the rent accruing on the said leases subsequent to the sale by the Receivers belonged to the purchaser at the Receivers' sale; that the so-called *assignment* of leases by the Company, the lessors, was a mere authority from the Company to the Bank to receive the rents; which ceased on the appointment of Receivers; and that it created no incumbrance on the property of the Company in the hands of the Receivers.

Second, that the rents accruing due after the appointment of the Receivers belonged to the Receivers, for the benefit of the creditors of the Company.

Third, that the rents which had become due before the appointment of the Receivers might be considered as appropriated to the purpose for which the Company authorized the Bank to receive them, though they remained unpaid by the lessees.

As a general rule, the taking of a note from a mortgagor or judgment debtor for interest due on the mortgage or judgment is not a payment of the interest if the note be not paid.

On the 22d Dec, 1846, "The Trenton Water Power Company" presented their petition, stating, that on the 16th Feb'

1831, an act of the Legislature was passed, entitled "An act to incorporate a company to create a water power at Trenton and its vicinity and for other purposes, by the name of 'The Trenton Delaware Falls Company.'"

That in the progress of the work of constructing the race-way, &c., the said Falls Company, being embarrassed for want of funds, applied to Samuel Comley, of Philadelphia, for a loan of \$3,500, to enable them to construct an aqueduct to carry the waters of the said raceway over the Assunpink Creek, for the supply of mills south of said Creek; and that thereupon an agreement was entered into between the said Falls Company and the said Comley, that Comley should loan the said Falls Company \$3,500 for that purpose; and that Comley should, from and after the completion of the said aqueduct, supply a cotton factory situated on the south side of the said Creek, called the Hoy factory, in which Comley was interested, with 250 square inches of water from their raceway, equal to \$750 per annum, at the rate at which they were leasing water, as a consideration for the said loan, and in lieu of interest, until they should repay the sum so borrowed.

That on the 2d April, 1833, the Falls Company made a mortgage to the Trenton Bank for \$4,000 loaned to them by the Bank, and on the same day gave another mortgage to the said Bank for the further sum of \$6,700 also loaned to them by said Bank; and on the 22d May, 1834, the said Bank recovered a judgment against the said Falls Company for the further sum of \$6,000, for other money loaned by said Bank to said Company; which mortgages and judgment were liens upon all the real estate of the said Company, and the said judgment a lien upon the personal property also. And that, on the 1st October, 1835, there was due to the said Bank for interest upon the said mortgages and judgment \$2,084.75. That the said Falls Company, being still embarrassed for money, and unable either to pay the arrears of interest due to the said Bank and for which the Bank was pressing them, or to pay said Comley the \$3,500 so procured from him and for which they were furnishing him, in lieu of interest, with water equal,

at its market value, to more than 21 per cent. per annum, on the 1st Oct. 1835, applied to the said Bank for further assistance, and proposed, that if said Bank would make them a further loan sufficient to pay the arrears of interest then due the Bank and to pay the said debt due to Comley, they, the Falls Company, would assign to the Bank, as security for the same, the rents reserved upon certain perpetual leases of water held by said Falls Company, to wit, a lease to McKelway, a lease to S. & T. J. Stryker, and a lease to James Hoy, senior, the rent reserved on which last lease would become available by the payment of the said \$3,500 so borrowed from Comley.

That the Bank, deeming the security offered sufficient, acceded to the said proposal; and on the 1st of Oct. 1835, loaned to the said Falls Company \$2,087; and in consideration thereof the said Falls Company made and delivered to the Bank their note, of that date, for the said \$2,087, payable to the said Bank three days after date; with which said sum of money so borrowed the said Falls Company paid to the said Bank the interest so as aforesaid due them on the said mortgages and judgment; and, on the 28th Oct. 1835, the said Bank loaned to the said Falls Company the further sum of \$3,504; and in consideration thereof the said Falls Company made and delivered to the said Bank their note, of that date, payable to the said Bank three days after date, for the said sum of \$3,504; with which sum the said Falls Company paid to the said Comley the money so borrowed of him.

That in compliance with the terms of the proposition so made and accepted, and to secure the said debt to the Bank, in accordance therewith, the Falls Company, on the 27th Oct. 1835, executed to the said Bank, their successors and assigns, an absolute and unconditional assignment of the lease to McKelway, the rent fixed by which was \$166 90, and the lease to the said Strykers, the rent fixed by which is \$450 67; and, on the 11th Dec. 1835, made and executed to the said Bank, their successors and assigns, an absolute and unconditional assignment of the lease made to James Hoy, senior, the rent fixed by which is \$750; which last mentioned rent had been made available by the said payment made to Comley.

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The petitioners say they have been informed and believe, that the Falls Company never gave any other security to the Bank, for the repayment of the said loan of \$5,591 except the said leases so assigned as aforesaid; and that it was understood by and between the said Companies, at the time of the agreement for the said loan, that the rents received from the said leases so assigned as aforesaid should be applied to the payment of the interest growing due to the said Bank upon the loans previously made, and also to the interest growing due to the Bank on the said notes, so long as the Bank should be willing to continue the said several loans; and the Bank did so apply the same; yet that that arrangement, so far as it respected the application of a portion of the income from the said leases to the payment of the interest upon the previous loans, was only a matter of temporary accommodation to the said Falls Company, and for their exclusive benefit, and was to continue only so long as the Bank should be disposed so to apply the said rents; and was never intended to alter, vary or change the original agreement by which said leases were assigned as security for the payment of the said notes, or to restrain the Bank, at any time when they might deem it necessary for their own security to do so, from prosecuting their mortgage and judgment liens against said Falls Company to a recovery, and applying the income from said leases to the payment of the principal and interest due on the said notes; and that the Bank would not have made the last mentioned loan unless they had been secured by the said assigned leases the repayment of the principal as well as the interest of said notes.

That, the Falls Company having become insolvent, Philemon Dickerson, J. Ewing and Samuel S. Stryker were appointed Receivers; and that, on or about Feb. 20, 1844, by virtue of a decree of this court made Nov. 6, 1843, and an act of the Legislature passed Feb. 15, 1844, the said Receivers sold, at public sale, all the real estate and chartered rights and privileges of the said Falls Company, free and clear of all incumbrance; and that C. S. Olden became the purchaser at the said sale, for \$50,000; and the said sale was subsequently confirmed by this court; and the said purchase money was thereupon paid to the

said Receivers, and a deed duly executed and delivered by them to the said Olden for the said property.

That the said Bank was largely interested with Olden in the said purchase, and advanced, as the petitioners are informed and believe, the purchase money for the same.

That J. M. Redmond, being desirous of becoming the owner of said property, proposed to Olden and the Bank, that upon the organizing a company under the name of "The Trenton Water Power Company," in conformity with the directions of the said act of the Legislature of Feb. 15, 1844, he would become the purchaser of the stock of the Company if they could agree upon the terms. That on the 1st of April, 1845, as the result of the negotiations that followed said proposition, an agreement was entered into between the said Olden, the said Bank and the said Redmond, that the said Olden and the Bank would at once proceed to organize the Company as aforesaid; that Redmond should have the stock of said Company for \$55,000, a certain mill and wharf belonging to the Bank for \$7,500, and should also take the note of said Falls Company, of Oct. 1, 1835, for \$2,087, and \$3,000 of the principal of the note of said Falls Company, of Oct. 28, 1835, at the sum of \$5,851.96, being the amount of the principal sum of \$5,087 and arrears of interest due thereon to the said 1st April, 1845; and that the Bank should assign to Redmond, or to such person or persons as he should direct, the said leases held by them as security for the said notes, with all the arrears of rent due upon the same.

That, on or about June 2, 1845, pursuant to the provisions of the said act of the Legislature, Olden and his associates organized themselves into a company under the name of "The Trenton Water Power Company," and thereupon the stock of said Company was duly transferred to the said Redmond, the title of said mill and wharf conveyed to him, and the said two notes assigned, the first in whole, and the second to the amount of \$3,000, to said Redmond; in consideration of which, Redmond paid over to Olden and the Bank \$25,810.59, in cash; and the said Water Power Company executed to the Bank two mortgages, one for \$13,000, the other for \$30,000, on the property and works of

said Company, being the whole amount hereinbefore mentioned as agreed to be paid, and \$458.63, interest on the purchase of the stock accrued before payment made.

That the said assignments of the said notes by the Bank to Redmond bear date April 1, 1845, that being the day when the agreement aforesaid was entered into; but were in fact *written* on said notes, and said notes delivered to Redmond on the 2d of June, when the agreement was fully consummated; and thereupon Redmond assigned and transferred the same to "The Trenton Water Power Company," who still hold the same. That the interest was paid upon the said notes while the property of the Bank, up to Jan'y 1, 1843, and that the whole of the principal moneys mentioned in said notes, with interest thereon from that day, still remains due and unpaid, of which, all but the principal and interest of \$500, reserved by the Bank, is due to the petitioners, the Trenton Water Power Company. That on the 27th June, 1845, in further completion and fulfilment of the agreement and sale aforesaid, the Bank granted, bargained, sold, assigned, transferred and set over to the said Water Power Company, their successors and assigns, at the request of the said Redmond, the three before mentioned leases and all rents thereby reserved and all moneys due and to grow due thereon, and all the estate, right, title, interest, claim and demand whatever of the Bank of, in, to or out of the same, in as ample manner as the same were then held by the Bank, the said Water Power Company performing and fulfilling all the covenants in the said leases on the part of the Bank to be performed. That at the time of the agreement of April 1, 1845, before mentioned, it was represented to Redmond by the Bank, and he believed and still does believe, there was an amount of arrears of rent due upon the said leases very nearly if not quite equal to the amount of the principal and interests of the said notes; and that Redmond purchased said notes under the full belief that by the assignment to him, or to said Trenton Water Power Company, of the said leases and all the rents due upon the same, by the Bank, the Water Power Company would be enabled very nearly, if not wholly, to re-imburse themselves to the amount of

said notes, by means of the said arrears of rent. And Redmond well knew at the time that the said Falls Company were utterly insolvent and unable to pay anything on the said notes.

The petitioners say that, soon after the assignment to them of the said leases, they had a settlement with S. S. & T. J. Stryker for arrears of rent so due on their lease, and received from them \$850 in full thereof, which they have credited on the said note of \$2,084; and that they were proceeding to collect the arrears of rent due on the lease to Hoy and McKelway when they were served by the receivers of the Falls Company with a copy of an interlocutory decree of this court directing the said receivers to proceed to collect from these petitioners, or from such person or persons as might be liable for the payment thereof, the rents reported by Jas. W. Wall, Esq., one of the masters of this court, to be due on said leases, so assigned, at the time of the said assignment, being for the term of three years and five months, from Jan'y 1, 1842, to June 2, 1845, and also \$850 reported by the said master to have been received by these petitioners of the said Stryker, and also \$500 due from Maynard and Hutchinson on said McKelway lease, without prejudice to the claims of the petitioners, Redmond, McKelway, or either of them; and that they, or either of them, be at liberty to apply to this court to have the validity of their respective claims to the said moneys settled according to the rules and practice of this court.

The petitioners insist that the Bank, as the holders of the said two notes of the Falls Company, and as assignees of said leases holding under assignments made to secure the payments of said notes, as aforesaid, had a lien upon the arrears of rent so due on the said leases, on the 2d June, 1845, and had a right to receive said arrears and apply them to the payment of said notes; and that they had, therefore, a right to assign to these petitioners the said arrears of rent, with the said leases, to be applied, when collected, to the payment of said notes; and that, by virtue of the said assignments of the said notes and leases and rents and arrears of rent due thereon, made by the bank to the petitioners, the petitioners became entitled to the said arrears of rent; and that

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they have a right, and ought to be permitted by this court to apply the arrears already received, and collect and apply the sums remaining due as aforesaid, to the payment of the amount due on said notes; and that, if the said receivers have collected or shall collect any part of said arrears, the same ought by the order of this court to be directed to be paid over by them to these petitioners.

On the reading of this petition an order was made referring it to James W. Wall, master, to ascertain the truth of the allegations of the petitioners, and whether the petitioners are entitled to have the said arrears of rent due upon the said leases at the time of the assignment thereof to them by the Bank; reserving all further equity until the coming in of the master's report.

On the 17th June, the report of Master Wall came in and was filed.

Testimony was taken before the master; and he states that the matters referred to him were submitted by the counsel of the respective parties upon the testimony.

Exceptions were filed to the report by "The Trenton Water Power Company."

S. G. Potts and *P. D. Vroom*, in support of the exceptions.

W. Halsted contra.

THE CHANCELLOR. The rent accruing subsequently to the sale by the receivers belongs to the purchaser.

The statute and the appointment of receivers under it is a conveyance or transfer of all the property of the insolvent company to the receivers, for the benefit of the creditors of the company, to be distributed in the mode pointed out by the statute; that is, proportionally to the amount of their respective claims, except mortgage and judgment creditors, who have preference.

What is called the assignment of leases by the Falls Company, the lessors, to the Trenton Bank, was a mere authority or power of Attorney from the Company to the Bank to receive rent.

It ceased on the appointment of receivers. It created no incumbrance on the property of the Falls Company in the hands of the receivers.

The rents accruing due after the appointment of the receivers belonged to the receivers, for the benefit of the creditors.

The Bank mortgages and judgment were liens for both principal and interest, and the property sold for more than sufficient to pay the mortgages and judgment, principal and interest. The ground not covered by the foregoing propositions is this: At the time of the appointment of the receivers five quarters rent had become payable on these leases. So far as the rents had become due before the appointment of the receivers, they may be considered as appropriated to the purposes for which the Falls Company had authorized the Bank to receive them, though they remained unpaid. The question arises, to what extent should the purposes for which the Bank were authorized to receive the rents require the application of the rents which had become payable before the appointment of the receivers?

If the Bank were authorized to apply these rents towards the payment of the principal of the two notes, then the whole amount of the five quarters rent which had become payable before the appointment of the receivers is absorbed by application to such payment.

If those rents are applicable only to the payment of the interest on those two notes, and the interest on those two notes had been paid up to Jan'y 1, 1842, then, only so much of those rents would be payable to the Bank as would pay the interest on those two notes from Jan'y 1, 1842, to the time of the appointment of the receivers, which, I think, was in May, 1843.

This would raise the question, whether the rents on those leases were, by the agreement between the Falls Company and the Bank when the leases were assigned to the Bank, applicable to the payment of the principal as well as of the interest of these notes. But, passing this question for the present, another view presents itself. The note of \$2,084 was given by the Falls Company to the Bank for interest accrued due to the Bank on their

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mortgages and judgment. Was the amount of that note credited by the Bank on their mortgages and judgment? and did the Bank receive from the receivers, in payment of their mortgages and judgment, only the amount thereof less the amount of this note of \$2,084? If the amount of this note for \$2,084 was deducted from the amount due the Bank on their mortgages and judgment, and if, as I suppose, the interest due and in arrear on their mortgages and judgment was more than the amount of that note, then, the question will be, did the Bank taking this note for the interest on their mortgage and judgment and giving credit for the amount thereof on the mortgages and judgment pay that interest in such way that if the note was not paid the security which the mortgages and judgment afforded for that interest was lost?

As a general rule, the taking of a note from a mortgagor or judgment debtor for interest due on a mortgage or judgment is not a payment of the interest if the note be not paid. The note, in this instance, not being paid, if the Bank received from the receivers only the amount of their mortgages and judgment after deducting therefrom the amount of this note, then, the Bank have not received the amount of interest which had become payable on their mortgages and judgment, but \$2,084 short of it; and the note for this sum remaining unpaid, the Bank should still receive the full amount of the interest upon their mortgages and judgment, unless there is something in the shape which the Bank gave to the transaction in reference to this note for interest which should deprive them of the right they would otherwise have had. The shape the transaction took was this: the Bank took a note for the interest; and instead of crediting, or saying by way of credit on their mortgages and judgment, that they had received a note for the interest, they entered the note on their Bank books as discounted, and gave credit to the Falls Company on their Bank books for the proceeds of the note, and, I presume, charged the Falls Company with the amount of interest due on their mortgages and judgment. Whether any credit was entered on the mortgages and judgment of interest received, and how that credit was made, does not, I think, appear from the papers before me. Should the fact that this shape was given to the trans-

action put the Bank in any worse condition than if they had simply taken a note for the interest, and held it, without passing it through their Bank books in the form of a discount? If it should not, then the Bank may still be entitled to the amount of rents on those leases which were due and unpaid at the time of the appointment of the receivers, on account of the interest due on their mortgages and judgment at the time they took the note of \$2,084; and if they are, it will absorb the whole amount of such rents.

I desire to be informed whether, in the settlement between the Bank and the receivers as to the amount due the Bank on their mortgages and judgment the Bank, credited this note of \$2,084, or the amount thereof, as paid on their mortgages and judgment, and received, in full, so much less.

It is said that Redmond or The Water Power Company paid these notes; and that therefore the rents pledged were released. I do not see it in this light. The Falls Company did not pay them. The Bank could assign them, and with them whatever security they had for their payment.

For the present it will be ordered, that so much of the rents on these leases as accrued between the time of the appointment of the receivers and the time of the sale by the receivers be paid to the receivers.

If the Bank received from the receivers the whole amount of their mortgages and judgment, principal and interest, giving no credit for the \$2,084 note, then, this note has been paid; for it was given for interest on the mortgages and judgment; and the question will be, whether the rents due at the time of the appointment of the receivers are applicable to the payment of the principal and interest of the note for \$3,500, or only the interest of that note.

WILLIAM G. WILLIAMS and others vs. MARTIN MABEE and others.

Bill filed July 11, 1843, stating that J. S. died in March, 1812, having devised a tract of land to P. S. in trust for the daughter of J. S., a married woman, and her children, free from the control of her husband. The daughter died, leaving six children. On the 4th November, 1812, the daughter and her husband and the children made a deed of the land to G. M., some of the children being under age; and P. S., the trustee, subscribed a writing under seal at the foot of the deed in the words following; "I do hereby agree to the above conveyance in manner and form therein set forth." The consideration of this deed was a deed from G. M. for certain lands in Ohio. The bill stated that P. S. had removed from the State; and prayed that a trustee be appointed in his stead, to carry the trust into effect. It appeared that after the minor children came of age they joined in a sale and conveyance of the land in Ohio. The Court refused to appoint a new trustee.

A sale and conveyance made by persons of full age of lands which had been conveyed to them while under age in exchange for lands conveyed by them while under age was held to be a confirmation of the deed made by them while under age.

Bill filed July 11, 1843, by Wm. G. Williams and Margaret his wife, Sanford F. Madden and Mary his wife, John Knoff, John Fish and Sally his wife, Hezekiah Oliver Cantwell and Mary Ann his wife, Margaret Randall and Lydia Randall of the county of Coshocton, in the State of Ohio, stating that John Simmons died in March, 1812, leaving a will and codicil, by which he devised to his son Peter Simmons, and to his heirs and assigns forever, a tract of land in Sussex, with a saw mill thereon, "to the use of and in trust for his daughter Lydia, wife of John Knoff, and all her children which she then had or might thereafter have by the said Knoff, so that the said Knoff should have no power or control over the same, but that the same should go to the sole and separate use and benefit of his said daughter and her children." That the said Lydia has since died, leaving six children by the said Knoff, namely, Susan, who intermarried with Oliver Randall, and who has since died leaving the complainant Mary Ann, wife of the complainant Cantwell, and the complainants Margaret Randall and Lydia Randall her children,

the complainant Margaret, who intermarried with the complainant Williams, Elizabeth, who intermarried with John Davids, and who is now dead, the complainant Mary, wife of the complainant Madden, the complainant Sally, wife of the complainant Fish, and the complainant John Knoff, who was the only son.

That the said will was duly proved by John Simmons and John Linn, the executors therein named, on the 18th March, 1812.

That the said Peter Simmons took upon himself the said trust imposed upon him by the said will.

That a deed of bargain and sale was drawn, purporting to be made between the said John Knoff and Lydia his wife, Oliver Randall and Susan his wife, Margaret Knoff, Elizabeth Knoff, Mary Knoff, Sally Knoff and John Knoff, of Sussex county, New Jersey, of the one part, and George Mabee, of the said county, of the other part, dated November 4, 1819, whereby, for the consideration of \$500, expressed in said deed as paid to the said parties of the first part, the said parties of the first part conveyed to the said Mabee, in fee, "all that piece of land which by a codicil to the will of John Simmons was left to Peter Simmons in trust for his daughter Lydia and her children." That the said deed was, on the day of the date thereof, as the complainants have been informed, executed by the said John Knoff and Lydia his wife, Oliver Randall and Susan his wife, Margaret Williams and Elizabeth, children of the said Elizabeth Knoff. That the execution of the said deed by the said Susan Randall was by compulsion and restraint, and not of her own free will and consent. That neither the said Elizabeth Knoff nor Margaret Knoff was of legal age when the said deed was so executed. That the complainant Margaret Williams was of the age of 19 years and 15 days, and the said Elizabeth of the age of 18 years, 7 months and 22 days, and that the said John, Mary and Sally were still younger.

That the said sum of \$500 was not the real consideration for said deed, and that no money or value whatever was received for the said land by the said John Knoff and Lydia his wife, Oliver Randall and Susan his wife, Mary and Elizabeth, or any of them, or any person for them; but that the

real consideration was a certain tract of land in Ohio to which said Mabee pretended to have title, which he pretended to convey to the said John Knoff and Oliver Randall, or one of them, or some other or all the said parties named in said deed of bargain and sale; and that the said John Knoff and Oliver Randall, nor either of them, nor any one of the parties named in said deed to Mabee, ever obtained the possession of the said land, or derived any benefit from the pretended title of said Mabee to the same so by him conveyed; but that the said title was defective and void, and of no value to them or any or either of them, although the said John Knoff and Lydia his wife, and Oliver Randall and Susan his wife, removed from this State to Ohio with the expectation of occupying and realizing the benefit of the said land, the consideration of the said deed.

That the complainants have been informed and believe and charge, that the said George Mabee and his wife, on the 1st March, 1825, by deed duly executed and delivered, for the consideration of \$300 therein expressed, did convey to John Mabee, of said county of Sussex, the said lot of land in Sussex, which said lot is in said deed described as the lot of land which said George Mabee purchased of John Knoff and his wife and their children; which deed was recorded, &c. That the complainants are informed and believe that the said John Mabee died in possession of said land, on or about March 1, 1836, leaving a will, which was duly proved by Sarah Mabee, his widow, and Martin Mabee and Jacob Mabee, his sons; by which will the said John Mabee devised all his real estate to his children, except the above named premises mentioned as devised by said John Simmons to the said Peter Simmons, trustee as aforesaid.

That the said John Mabee, deceased, left George, John, Jacob, Robert and Martin Mabee, and Ann, wife of Schooley Darius, Jane, wife of Ephriam Kimball, and Hannah, wife of John Struble, his children and heirs at law. That the complainants are informed and believe that, afterwards, on the 17th of March, 1838, the said George Mabee and his wife, Jacob Mabee, Robert Mabee and his wife, Schooley Darius and Ann his wife, Ephriam Kimball and Jane his wife, and John Struble and Hannah his wife, by a deed of re-

lease and quit claim, did bargain, sell, release and convey to Martin Mabee the lands in question ; to have and to hold to the said Martin Mabee, his heirs and assigns forever.

That the complainants have been informed and believe, that the said Peter Simmons, the said trustee, after the execution of the said deed from John Knoff and wife and Oliver Randall and wife and Margaret Williams and Elizabeth Davids to the said Geore Mabee, removed from this State to the western part of Pennsylvania, not less than 15 years ago, to the best of the complainants' information. That the complainants are unable to say whether or not he is still living.

That the said John Knoff died in May, 1844, and that the said Lydia, his widow, died August 10, 1838, leaving the complainants Margaret Williams, Mary Madden, Sally Fish and John Knoff, her children, and the complainants Mary Ann Cantwell, Margaret Randall and Lydia Randall, her grandchildren, children of Susan Randall, her heirs at law ; the said Susan having died before the death of said Lydia Knoff, and the said Elizabeth Davids being also then dead without leaving any children.

That the said John Mabee the younger and the said Martin Mabee, since the death of the said John Mabee the elder, or one of them, have or has occupied and enjoyed the premises in question, and received the rents, issues and profits thereof, and still receive the same.

That since the death of the said Lydia Knoff the complainants have frequently and in a friendly manner applied to the said John Mabee and Martin Mabee to yield up to the complainants the possession &c. ; and to account for the said rents and profits, or to make a proper compensation to the complainants and receive a perfect title from the complainants.

The bill prays that a trustee be appointed, instead of the said Peter Simmons, to carry into effect the trust contained in the said will of John Simmons in relation to the premises in question ; and that an account may be taken of the rents and profits which have come to the hands of the defendants, or either of them, and that they made to account therfor to the trustees so to be appointed, to be appropriated in discharge

of the said trust ; and that the premises may be sold under the direction of this court, and that all proper parties be decreed to join in the said sale ; and for such other and further relief as &c.

Process is prayed against Martin Mabee and his wife, John Mabee and his wife and Peter Simmons.

The answer of Martin Mabee was filed June 14, 1847. He admits the will of John Simmons as stated in the bill. Admits that John Knoff and Lydia his wife, Oliver Randall and Susan his wife, Margaret Knoff and Elizabeth Knoff executed to Geo. Mabee a deed for the premises in question, for the consideration of \$500, dated November 4, 1819 ; but that said deed was not, nor was any other deed for said land executed by Mary, John and Sarah, children of said Lydia, or either of them, to said George Mabee, to his knowledge or belief.

He denies that the said deed was executed by Susan Randall upon any compulsion and restraint, but, as he is informed and believes, of her own free will, without any fear, threats or compulsion of her husband or of any other person. He says he has no knowledge of the age of Margaret and Elizabeth Knoff when they executed the said deed.

He denies that the said deed was without adequate consideration ; but says he is informed and believes that it was made in consideration of \$212 in money, paid by said Geo. Mabee, and the conveyance to the use of the wife and children of said John Knoff of a tract of land of 112 acres in Coshocton, Ohio, for which the said George Mabee had paid \$300 ; which consideration was more than the value of the lands conveyed by the said deed to the said George Mabee.

He denies that the title to said lands in Ohio was defective ; but says he is informed and believes that the title was good, valid and subsisting at the time of the said conveyance thereof ; and that if Knoff and his wife did not have possession thereof it must have been by reason of their own neglect and misconduct.

He states that the contract for the conveyance of the said land to the said George Mabee was upon adequate and full consideration, and for the benefit and advantage of the said Lydia Knoff and

her children, who were poor and needed more land for their comfortable support, and believed it would be better for them to move to Ohio, where they would have a farm of 112 acres and more means of subsistence; and that the said conveyance by the said George Mabee to them was made in good faith, and truly to the interest and advantage of the said family.

He says that Peter Simmons, the said trustee, agreed with the said family in the belief that the said contract would be to their advantage; and that he united with them in the said contract, and also in the said deed, and expressed his concurrence therein by his writing, under his hand and seal, subjoined to the said deed, as follows: "I do hereby agree to the above conveyance in manner and form therein set forth. Given under my hand and seal the date above." He says that the said George Mabee, soon after the said conveyance to him, took possession of the premises in question claiming to be the owner thereof, and occupied the same until about May 1, 1825, when he sold and conveyed the same to John Mabee, for \$300, which was then estimated to be the full value thereof. That John Mabee continued in possession of said land until about February 11, 1836, when he died, leaving a will by which he directed the said land, together with other lands, to be sold to pay debts and legacies, as by said will appears. That the executors of the will of said John Mabee, and all the children of the said John Mabee except his son John, united in the conveyance of the land in question, with others, to this defendant, by their deed dated March 17, 1838. That the land in question, after the death of said John Mabee, up to the time of the conveyance in question, was occupied by the heirs and executors of the said John Mabee; and since the conveyance thereof to this defendant has been occupied by them to this time. And he submits that the land in question having been in the possession of him, this defendant, and those under whom he holds, since 1819, more than twenty-three years before the commencement of this suit, he ought not now to be disturbed in the enjoyment thereof; but should be protected by the Statute of limitations; and he prays the benefit thereof as fully as if he had formally pleaded the same.

He says he is informed and believes that, after the said John Knoff and his family had moved to Ohio, the said George Mabee offered to the said John Knoff and Peter Simmons that, if they would re-convey to him the said land in Ohio and pay back the money paid by him as part of the consideration of the premises in question, he would re-convey the premises in question to them; but they refused to do so.

That since the commencement of this suit a proposition was made to him to arrange the matter in controversy; and with a view to such arrangement he made various propositions, and, among others, he proposed to said Peter Simmons that, if he would procure a conveyance to this defendant of the said Ohio land by the same or as good a title as that which said George Mabee's deed gave, he would pay and allow to him, the said Peter Simmons, or to the heirs of the said John Knoff and wife, the full value of the said tract of land in Sussex, [the premises in question,] deducting what had been paid by the said George Mabee thereon; but that said Peter declined the said proposition, saying he had no authority or power to procure such conveyance.

He says that the claim of the complainants has been in treaty for arrangement almost ever since the filing of the bill of complainant; and that in July, 1846, as he is informed and believes, a copy of an order to file an answer to the bill was served on this defendant, and that this defendant, through his solicitor, then renewed the said treaty of arrangement, and the same was continued until September then next, at which time the said Peter Simmons, who resided somewhere in the western part of Pennsylvania, visited Sussex, and called on this defendant in relation to the said claim, and this defendant proposed further terms which he, the said Peter Simmons, said he was not authorized to accept in the absence of the children and heirs of the said John Knoff and wife, who resided in Ohio, but it was proposed that the solicitor of the complainants and the said Peter should communicate by letter to the said children and heirs the terms of the proposition, and that proceedings in the suit should be suspended until an answer should be obtained. And he says he was informed and believes, that the solicitor of the complainants did communicate

by letter to the complainants, or some of them, the said proposition ; and he has several times since inquired for, but has received no reply thereto ; and that by reason of the said understanding he has omitted to file his answer until this time ; and that the omission to file his answer has not been for the purpose of delay, but with the desire and expectation of having some amicable arrangement of the same.

Testimony was taken on both sides.

W. Halsted for the complainants.

D. Haines for the defendants. He cited 1 *Bro. Ch.* 72 ; 18 *Ves.* 395, 418 ; 2 *Ch. Ca.* 63 ; 1 *Cruise's Dig.* 493, 5, 524 ; *Ambl.* 545 ; 1 *Coxe's Ch.* 199 ; 3 *Cruise's Dig.* 375 ; 6 *Ib.* 29 ; *Selwyn on Trusts*, 138 ; 3 *Burr.* 1794.

THE CHANCELLOR. If the concurrence of Peter Simmons, the trustee, in the conveyance made to Mabee in 1819, expressed at the foot of that deed, amounted to a conveyance by him of the legal estate, the consequences of such conveyance would be the same against a new trustee as against Simmons. If, by reason of such concurrence, Simmons could not maintain ejectment, a new trustee could not ; and in this view the appointment of a new trustee would be useless.

If there is any equity, at this late day, in any of the *cestuis*, it must arise from Mabee's having knowledge of the trust when he took the conveyance of 1819. But by this knowledge Mabee became trustee ; and the trust would follow to his grantees, as far as they, respectively, had notice of the trust, or are chargeable with notice ; and no further. In this view, also, I see no good reason for the appointment of a new trustee.

If the said concurrence of Simmons, the trustee, expressed as aforesaid, did not convey the legal estate out of him, yet Mabee is protected so far as respects the *cestuis que trust* who were of age and joined in the said conveyance to him. In reference to the rest of the *cestuis que trust*, or all of them but one, a fact appears in the testimony of a witness

residing in Ohio, taken under a commission, which does not appear in the pleadings, not being known, as I suppose, to the defendants until the return of the commission, and which should have an influence in favor of the defendants. It is, that the *cestuis que trust* after they were all of age, or their representatives, sold and conveyed their interest in the Ohio farm which was conveyed by Mabee in exchange for the lands in question in this suit. This testimony speaks as to all but one ; and the defendants think they can show that that one also joined in the conveyance of the Ohio farm.

I think that this act should, after so great a lapse of time, under a proper state of pleadings, be considered a confirmation of the deed to Mabee by all the *cestuis que trust* who joined in the conveyance of the Ohio farm. And I am willing, under the circumstances, that such course be taken in the cause, on the part of the defendants, as will give them the benefit of this fact.

If, under these views, it is thought, on the part of the complainants, that either of the *cestuis que trust* is in a position to call for an execution of the trust so far as his or her interest is concerned, I have no objection to retain the bill. But these suggestions are made without prejudice, and without intending to give any decided conviction in favor of any *cestui que trust* though he or she may not have joined in the conveyance of the Ohio farm.

A new trustee will not now be appointed.

THOMAS BLACK and JOHN BLACK *vs.* ASHER MORSE, AARON
R. COMBS and others.

T. gave two mortgages, one to M. and the other to R. of a tract of land of 18 acres; and afterwards conveyed to A. half of the tract, and thereupon A. gave to T. an obligation that he would pay, as part of the purchase money for the said nine acres. the said two mortgages to M. and R. A. afterwards gave to B. a bond, and, to secure it, a mortgage on the nine acres he had bought of T., as additional security for moneys for which B. held A.'s mortgage on other lands. T. afterwards conveyed the residue of the tract to C., with full covenants of warranty, and at the same time assigned to C. the said obligation of A. to pay the two mortgages held by M. and R. M. filed a bill for the foreclosure of his mortgage; making R. a party defendant. B. was not made a defendant, he not having got his mortgage from A. when the bill was filed. A decree was obtained in that suit for the sale of the whole tract, to satisfy the mortgages of M. and R.; and a *fi. fa.* for sale was issued to the Sheriff. B. then filed his bill, stating, that the half remaining in T. after he had sold half to A. was sufficient to pay the mortgages to M. and R., and submitting that the half so remaining in T., and which was afterwards conveyed by T. to C., should be first sold; and prayed an injunction staying proceedings on the *fi. fa.* which had been issued. The injunction was allowed.

On answer and motion to dissolve the injunction, it was held that, as between C. and A., the half so conveyed to A. ought to be first sold, to pay the mortgages held by M. and R.; and that the equity was the same between C. and B., the mortgagee from A.

Held, that A. was not a competent witness to prove payment of his said obligation to T., though B. had released him from personal liability on his said bond to B. and agreed to rely only on the said mortgage given by A. to B.

Held, that T., on being released by C. from his covenants in his deed to C., was a competent witness to prove that B. had notice, before he took his mortgage from A., that A had given his obligation to T. to pay mortgages held by M. and R.

Joseph I. Thompson executed, with his wife, two mortgages on a tract of land of 18 76-100 acres; one to Asher Morse for \$400, dated June 7, 1837; the other to Richard Davis and Jos. Murphy for \$500, dated May 19, 1838, which was afterwards assigned to Jos. F. Randolph; and afterwards, by deed dated May 28, 1842, executed by him and his wife, conveyed nine acres of the said tract to Simon Abrams. On this conveyance to Abrams he executed and delivered to Thompson a bond, dated June 1, 1842, in the penal sum of \$1,800, conditioned "that he, Abrams, his heirs, &c., should pay the said two mortgages on the whole tract."

On the 1st of April, 1843, Abrams executed to Thomas Black and John Black a bond conditioned for the payment of \$865.28; and on the 20th July, 1843, executed to the said Blacks a mortgage on the nine acres so conveyed to him by Thompson, to secure the payment of the said bond; which last mentioned mortgage was recorded July 21, 1843.

On the 3d of August, 1843, Thompson, with his wife, by deed of that date, conveyed the residue of the said tract of 18 76-100 acres to Aaron R. Combs, with full covenants of warranty; and on the same day assigned to Aaron R. Combs the said bond of Abrams conditioned for the payment of the said two mortgages held by Morse and Randolph.

At the time this bond was assigned to Combs there was an indorsement on it, signed by Thompson, dated July 18, 1843, of the receipt of \$130 on the said bond.

Morse filed his bill in this court for the foreclosure of his mortgage; making Randolph a party defendant. The subpoenas on this bill were returned to the July term, 1843. The Blacks were not made defendants in that suit. They did not get their mortgage till July 20, 1843; probably after the subpoenas were issued in the cause.

In January term, 1844, a decree in that suit was obtained for the sale of the whole tract of 18 76-100th acres, to satisfy Morse \$442.62 and costs, and to satisfy Randolph \$550.62 and costs. And a *fi. fa.* for sale was issued to the sheriff.

In this state of things the Messrs. Black exhibited their bill, filed May 15, 1844, stating that they had no knowledge of the proceedings in the before mentioned suit until the premises were advertised for sale; that they are satisfied that that part of the premises covered by the Morse and Randolph mortgages which Thompson retained, after the conveyance of the nine acres to Abrams, are sufficient to satisfy the Morse and Randolph mortgages; and submit that the said residue of the said premises remaining in Thompson should be first sold; that they are informed and believe that Thompson intends to direct the sheriff to sell first the nine acres so sold by him to Abrams, and by Abrams mortgaged as aforesaid to them; and that in such case they must lose their debt, as Abrams, since the execution and delivery of

the said mortgage to them, has become insolvent, and has no other property out of which they can realize the amount due them on their said mortgage.

The bill prays an injunction restraining the sale of the said nine acres; and for such other and further relief, &c.

The injunction was allowed.

Answers were put in and proofs taken; and the cause was submitted on the pleadings and proofs and written briefs.

J. L. N. Stratton for complainants.

P. Vredenbergh for Comos.

THE CHANCELLOR. On the purchase by Abrams of the nine acres of the tract covered by the Morse and Randolph mortgages, if he had paid the consideration in full, an equity would have arisen in his favor requiring that the residue of the tract remaining in Thompson should be first sold for or towards the satisfaction of those mortgages.

He did not pay the consideration in full; \$900 of it, an amount equal to what was then due on the said two mortgages, was retained by him; and he gave Thompson his bond conditioned that he would pay that sum by paying those mortgages. No equity, heretofore, arose in his favor, either against Thompson or his grantee, to have the land which remained in Thompson first sold.

An effort has been made on the part of the complainants to show that Abrams afterwards paid to Thompson the \$900. From the proofs in the cause in reference to this matter, even if Abrams' testimony were competent, I am satisfied that, with the exception the \$130 indorsed in the said bond, it never was paid. Have the Blacks, the complainants in this case, any better equity against Thompson than Abrams had? It is said that the bond given by Abrams to Thompson is no lien on the nine acres. The question is not whether this bond is a lien on the nine acres; but whether Abrams' giving a mortgage to the Messrs. Black

on the nine acres gave them any better equity than Abrams had; whether it gives them the equity which Abrams would have had if he had paid to Thompson the whole consideration money. Had the Messrs. Black a right to presume that Abrams had paid the full consideration money, and to repose on the equity which in that case would have arisen in favor of Abrams. The Messrs. Black are chargeable with knowledge of the Morse and Randolph mortgages, covering the whole tract. They were recorded. Was the fact that Thompson had given a deed for nine acres of it to Abrams sufficient ground for them to assume that Abrams had paid Thompson the full consideration for the nine acres, knowing, as he, Abrams, did, [for he too was chargeable with that knowledge,] that there were two mortgages covering the whole tract? Had they a right to assume, from the mere fact of a deed for the nine acres, that Abrams had paid the full consideration, and to omit inquiring of Abrams or Thompson how it was? If they inquired, and ascertained how it was, and acted, in taking their mortgage, on the idea that the bond given by Abrams to Thompson was not a lien, they acted on mistaken ground; for the question is not, whether the bond was a lien, but whether Abrams, having assumed the payment of the Morse and Randolph mortgages, had any equity to have the land retained by Thompson first sold. The only ground the Messrs. Black can take is that, seeing that Thompson had made a deed to Abrams for the nine acres, they were deceived into the belief that Abrams had paid the full consideration money; and that, therefore, though Abrams had not paid the full consideration, and had himself, no equity against Thompson, yet that they have. This will not do. With the knowledge of the existence of the mortgages to Morse and Randolph of the whole property, and the knowledge which every man must be presumed to have of the different modes of dealing when land which is subject to mortgage is conveyed by the mortgagor, they had no right to omit inquiry and rely on the face of the deed from Thompson to Abrams as proving payment of the consideration. No man would have advanced money on a mortgage from Abrams on the nine acres under such circumstances. And they did not advance money. They merely took this mortgage from

Abrams as additional security for money to secure which they had a mortgage on Abrams' mill property. I am of opinion that, even without the evidence of notice of the bond given by Abrams to Thompson, the complainants have no better equity against Thompson than Abrams had.

But Thompson swears, that he informed one of the Blacks, before they took their mortgage from Abrams, that he had a bond against Abrams by which the part he had sold to Abrams was bound to pay the mortgages that were against the whole property; that he named the mortgages, and who held them, and the amount of them. It was said in argument, on the part of the complainants, that this was not a true description of the bond—that the bond did not bind the land conveyed to Abrams, but bound Abrams to pay the mortgages. There is nothing in this. The effect is the same. Abrams was bound by the bond to pay the mortgages; the mortgages were existing in the hands of third persons, and were liens on the whole tract. Abrams, by his bond to Thompson, became bound to pay them. As between him and Thompson he had no equity that the land retained by Thompson should pay them; but the lien thereof, as between him and the mortgages, remained on the whole tract; and as between him and Thompson was, in equity, wholly on the part he had bought. I see no objection to Thompson's competency, if his evidence was necessary. He was released from his covenants in his deed to Combs before he was sworn. He has, then, conveyed to Combs without covenants, and assigned to Combs the bond of Abrams by which Abrams agreed to pay the mortgages, and by the effect of which Abrams' nine acres would in equity be directed to be first sold. As between Abrams and Combs, I do not see that Thompson has any interest. The fact that his bonds accompany the mortgages to Morse and Randolph makes no difference in this respect. The lands are all still bound by those mortgages: the question is, simply, which land shall be sold first, the land conveyed to Abrams or that conveyed to Combs. Is Abrams a competent witness on this question? The complainants have released him from personal liability on the bond he gave then, and have agreed to rely on the land only, that is,

the nine acres mortgaged by Abrams to them. Is not Abrams still interested in having Combs' land first sold to pay the Morse and Randolph mortgages? If those mortgages are satisfied out of Combs' land, Abrams has the nine acres to pay his own debt to the complainants and to relieve, to the extent of their value, the mortgage on his mills. It is said his interest is balanced: that if Combs' land is sold to pay the Morse and Randolph mortgages, he would be liable to Combs on the bond he gave Thompson and which Thompson assigned to Combs. But this is a suit between the Messrs. Black, as assignees of Abrams, against Combs, for the purpose of deciding the question whether the part conveyed to Abrams or the part conveyed to Combs shall be first sold; and this depends on the question whether Abrams paid to Thompson the amount of that bond. If this court, in a suit in which Combs is a party, decide that Abrams paid to Thompson the amount of that bond, and thereupon decree that Combs' land be first sold, could Combs maintain an action on the bond? Again, if it be decreed here that the land conveyed to Abrams be first sold, it will be liable for the costs of the foreclosure, and for interest upon the interest of the two mortgages and on the costs, from the time of the decree; whereas if it be decreed that the land conveyed to Combs be first sold, he has but to pay the amount due on the bond assigned to Combs, and avoid costs, or be subject to a much less amount of costs if he suffers a prosecution on that bond. It seems to me that it cannot be said that his interest is balanced; and I am inclined to think he is not a competent witness. But, if he is, the payment of the bond, as I have said before, is not established.

As to the \$130 indorsed on the bond as received by Thompson from Abrams, it was paid, and the payment thereof was indorsed on the bond, before the assignment of the bond by Thompson to Combs. If Thompson, notwithstanding the condition of Abrams' bond to him required Abrams to pay the mortgages, had received from Abrams the \$900 mentioned in the condition of the bond, and thus received, himself, the full consideration for the nine acres, an equity would have arisen, between Abrams and Thompson, in favor of Abrams, to have the lands remaining in Thompson first sold for the satisfaction of the two mortgages. His receiv-

ing part of it raises an equity to that extent. Thompson, on receiving part of the money, should have applied that part towards the payment of the mortgages. If he did not do so, the land retained by him should by first liable for it. And Combs, having notice of that payment, by the indorsement on the bond, is subject to the same equity.

It will be decreed that the nine acres be first sold, to raise a sum equal to the amount due on the bond given by Abrams to Thompson ; and that for the residue the land of Combs is first liable.

Order accordingly.

CITED in *Warwick v. Ely*, 2 *Stew.* 55.

JOHN DEGROOT *vs.* E. R. V. WRIGHT and wife.

The bill, filed in 1848, stated that, in 1817, the complainant's mother, a widow, agreed with complainant that he might take possession of a tract of land, and make improvements on it; and that, in consideration of his so doing, he might take the rents, issues and profits thereof during his natural life. That the complainant, accordingly, took possession of and has since continued to cultivate the said tract, and to take the rents, issues and profits thereof, and has built a dwelling-house, &c., thereon. That his mother, in 1846, conveyed the said tract to a daughter of the complainant, in fee, for the consideration of natural love and affection. That the said deed was accepted by the daughter with full knowledge of the interest of the complainant; and that it was understood and agreed that it was not to take effect during the life of complainant. The bill prayed that the deed might be corrected; and that the daughter might be restrained by injunction from prosecuting an ejectment. The injunction was allowed. The mother was not made a party.

The answer denied all knowledge or information of any agreement that the complainant was to enjoy the land during his life, or for any other term; and stated that the defendant is informed and believes that no such agreement was ever made between the complainant's mother and him; and averred that the deed to the defendant was drawn according to the wishes and desire of complainant's mother.

Held, that the mother should have been made a party defendant. And that, she not being made a party defendant, the answer was sufficient to dissolve the injunction.

The bill, filed in 1848, states, that Joanna DeGroot, about 1817, was seized and possessed of a certain tract of land containing about 810 acres, (describing it,) bounded, &c., and on the south by lands now in the occupancy of the said Joanna; and that the said Joanna, who is the mother of the complainant, and with whom the complainant was living at the time of making the agreement mentioned in the bill, and hath continued to do so from thence hitherto, about the year 1817, as well in consideration of the natural love and affection which she bore the complainant as for the benefits she would derive from the improvements the complainant proposed to put on said lands, agreed with the complainant that he might enter upon and take possession of the said tract of land and make improvements thereon, and that, in consideration of so doing, the complainant might possess and enjoy the said tract of land and have the rents, issues and profits thereof to his own use and benefit, for and during his natural life.

That before the time of making said agreement, and before the complainant took possession thereof as after mentioned, the said tract was in a low state of cultivation and unproductive; the fences out of repair and going to waste; no dwelling house or barn or other buildings on the same; and that, about the year aforesaid, the complainant entered upon and took possession of the said tract, and commenced to cultivate, and hath since, hitherto continued to cultivate the same; that he hath built a good, substantial farm house, barn and other outbuildings thereon repaired; old and erected new fences wherever the same were wanting; planted fruit trees and made other improvements; which have greatly advanced the value of the said property. That these improvements have been made at the sole expense of the complainant, and have cost him at least \$3000.

That the complainant has always, since he first entered into possession of the premises, hitherto, by himself and his tenants been in the actual occupancy and possession of the same, and taken to his own use the rents, issues and profits thereof. That one John Scott, senior, is now, as the tenant of the complainant, in the possession and occupancy of the dwelling house, barn, garden and curtilage belonging to said tract, and the complainant is in possession and occupancy of the residue thereof.

That the said Joanna, on or about Sept. 5, 1846, conveyed, as the complainant has been informed and believes, by deed, the said premises to Naomi C. E. Wright, the wife of Edwin R. V. Wright, her heirs and assigns; the said Naomi being the daughter of the complainant and the granddaughter of the said Joanna; and that the said conveyance was made upon the consideration of natural love and affection. But the complainant charges, that the said deed was made and accepted with full knowledge by said Naomi and the said E. R. V. Wright of the rights and interests of the complainant in the premises; and that it was understood and agreed between the said Joanna and the said Naomi, and as he believes with the said E. R. V. W., that the same was not to take effect during the lifetime of the complainant, so as to affect or interfere with his rights and interests in said premises during said period; and that the complainant was to have the use and possession of the premises during his life.

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That the said Joanna is aged 84, or thereabouts, and confided in the said E. R. V. W., who is a lawyer by profession, to draw the said deed; and if the said deed does, not, as the complainant believes it does not, reserve the use of the said lands to the complainant during his life, it was drawn in violation of the express understanding and agreement made by the said Naomi and, as the complainant believes, by the said E. R. V. W. also, with the said Joanna, that the complainant should possess and enjoy the same to his death; and is a fraud upon the said Joanna and the complainant.

That the said E. R. V. W. and the said Naomi have lately threatened to turn the complainant and his said tenant out of possession; and that, before the 1st of May last, the said E. R. V. W. caused to be served upon the complainant a notice in writing requiring the complainant to deliver up to him on the 1st of May the possession of said premises, or that he would hold the complainant liable as a trespasser.

That the said E. R. V. W. and his said wife have lately brought two ejectments; one against the complainant and the other against the complainant's said tenant, John Scott, senior.

The bill prays that the said deed may be corrected, in conformity with the alleged agreement, so as to reserve to the complainant a life estate in the premises; and that the said E. R. V. W. and wife may be perpetually enjoined from prosecuting the said ejectments, and from commencing any other action during the life of the complainant to turn him or his tenants out of the possession of the premises, or in any way to disturb his enjoyment thereof; and for further and other relief.

Wright and his wife are the only defendants.

A preliminary injunction was allowed.

The defendants answered the bill.

They admit the seizing of the said Joanna as stated in the bill; and that she and the complainant have lived together in the same house and on the same farm, as stated in the bill.

They deny that they had any knowledge or information, ex-

cept by the bill, that any such agreement was entered into between the said Joanna and the complainant as in the bill stated, or any agreement whatever by which the complainant was entitled to enjoy said tract of land for his natural life or for any other time, except as the tenant at will; but that they are informed and believe, and therefore aver, that no such agreement was ever made or entered into between the said Joanna and the complainant.

They say they are ignorant of what was the state of cultivation of the said tract at and before 1817, or the condition of the fences thereon; but that they have been informed and believe that there was then no house or barn upon the same, and that a house, barn and other improvements have been put upon the same under the superintendence of the complainant; but that they do not admit or believe that they cost \$3,000, or were made at the proper cost of the complainant; but they aver that at and after 1817 the said Joanna was a widow possessed of considerable property, consisting of her homestead farm, of which the tract described in the bill formed a part, and of money at interest, and of a house and lot in the city of New York, rented out. That the complainant, being her only child, and having at that time her entire confidence, was entrusted by her with the management of all her property, collected and received her interest and rents and the produce of her land, and therewith improved the property at his discretion, as these defendants are informed and believe, in the expectation that at the death of his said mother he would succeed to her whole estate, real and personal, and without any agreement or understanding whatever for a life estate or any other estate in said lands made or entered into with the said Joanna. And they aver and insist, that the complainant received of the moneys of the said Joanna, in manner aforesaid, not paid over by him to her or otherwise appropriated to her use, more than all the moneys expended by him in the improvement of the said tract of land. They admit that the complainant has been, since about 1817, in possession of said tract, by himself or his tenants; but only, as they insist and aver, by permission of and as tenants at will under the said Joanna, who permitted him to take the rents, is-

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sues and profits thereof, or the greater part of the same, to his own use; she herself residing upon and being in possession of the same jointly with him.

They admit that John Scott, senior, is in possession of part of said land in the bill described, as tenant of the complainant, and of the dwelling house, barn and garden thereon.

They say that on the 24th of March, 1844, and for several years before that time, the said Joanna was and had been dissatisfied with the complainant on account of his conduct towards her and his mismanagement of her property, and had withdrawn her confidence from him, and had determined to convey her property, or the greater part thereof, beyond his control, unto her grandchildren, the children of the complainant, upon condition and in consideration of her said grandchildren securing to her a full, ample and respectable support and maintenance during her natural life. And that, in pursuance of said determination, she did, on the 24th of March, 1844, by deed of that date, with full covenants of warranty and against incumbrances, convey to the defendant Naomi a house and lot in Lispenard street, New York, known as No. 234 on the Lispenard map. And that, at the time of the execution and delivery of the said conveyance, and as the consideration thereof, the defendant, E. R. V. Wright, jointly with Samuel E. DeGroot, a grandson of the said Joanna, to whom, in pursuance of her said determination, she had also conveyed a part of said real estate, executed and delivered to the said Joanna a deed of covenant, bearing even date with the said conveyance, in the words and of the tenor following: "In consideration of the homestead farm being conveyed to me, Samuel E. DeGroot, by my grandmother, Joanna DeGroot, being the place on which she now lives, by deed bearing even date herewith, and in consideration of the house and lot belonging to the said Joanna DeGroot being conveyed to her granddaughter Naomi, my wife, now therefore we the said Samuel E. DeGroot and Edwin R. V. Wright do covenant to and with the said Joanna DeGroot, for ourselves and our heirs, jointly and severally, that we will, during her natural life, furnish and provide or pay to the said Joanna DeGroot a full support and maintenance, or such sum of money annually as she shall consider equivalent for the purpose of sup-

porting and maintaining her, in as full, ample and respectable a manner as she has always lived." In witness, &c.; dated March 26, 1844. And that the said house and lot in New York, so conveyed to said Naomi by the said Joanna, as part of her share in the distribution of her estate and for the consideration of the covenant aforesaid, was afterwards discovered by the said Joanna to have been incumbered by means of the complainant and the confidence reposed in him by her, to a large amount; which was not known to the said Joanna at the time of such conveyance. She did, therefore, for the purpose of carrying out her original intention, and of making good to the said Naomi the loss occasioned by said unexpected incumbrance, and of satisfying the breach of the covenant in said deed, by deed dated Sept. 5, 1846, convey to the said Naomi, in fee simple, the lands in the said bill of complaint described. But the defendants, each for himself and herself, deny that they had any knowledge, intimation or belief, at the time of the making and delivering said deed, that the complainant had any right or interest in said lands, either at law or in equity, for his natural life or for any other term whatever; or that it was understood and agreed between the said Joanna and the said Naomi that said deed was not to take effect during the lifetime of the complainant; or that it was any part of the agreement or understanding on which said deed was delivered that the complainant should have the use and possession of the premises during his life. They admit that said Joanna is of about the age mentioned in the bill; and that the defendant E. R. V. W. is a lawyer, and was intrusted by her to draw said deed, and did draw the same, and that the same is an absolute conveyance in fee simple; but they deny that the same was drawn in any way or respect different from or in violation of any understanding or agreement between the said Joanna and these defendants, or either of them, or different from her understanding, wishes or instructions; or that the same was in anywise a fraud. And they aver it was drawn according to her desire and instructions. They insist that, if any such agreement was made between the said Joanna and the complainant as is stated in the bill, which they do not admit or believe, it was not in writing or sign-

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ed by the said Joanna, and that therefore, by the act for the prevention of frauds and perjuries, any estate which the complainant could or would acquire in said premises under such agreement, if made, would have been an estate at the will of said Joanna and her assigns only, which estate at will, if any existed, was terminated by these defendants by their notice to quit, in the bill stated to have been served. And they pray that they may have the same benefit of the said statute and the facts above set forth relative thereto as if the same had been pleaded.

On this answer, a motion was made to dissolve the injunction.

A. O. Zabriskie for the motion.

W. Pennington contra.

THE CHANCELLOR. The complainant is the only child of Joanna DeGroot. The defendant, Naomi Wright, is a child of the complainant. The complainant and his mother, after the death of his father, continued to live together on the homestead farm of his deceased father.

The case made by the bill is, shortly, that, in 1817, the said Joanna, the complainant's mother, agreed with the complainant that he might enter upon and take possession of a certain tract of land of about eighty acres, and make improvements; and that in consideration of so doing, he might possess and enjoy the same and take the rents, issues, and profits thereof during his natural life. That, about the year aforesaid, the complainant took possession of the said tract and commenced to cultivate the same, and hath since hitherto continued to cultivate the same. That he has built a dwelling house, barn and other out-buildings thereon, and made other improvements; and has always, since he so took possession, been in the occupancy and possession thereof and taken to his own use the rents, issues and profits thereof. That the said Joanna, in September 1846, conveyed the said tract to the defendant Naomi, wife of the defendant E. R. V. W., her heirs and assigns, for the consideration of natural love and affection.

That the said deed was made and accepted with full knowledge by the defendants of the rights and interests of the complainant in the premises, and that it was understood and agreed, that the same was not to take effect during the life of the complainant, so as to affect his rights and interests during said period, and that the complainant was to have the use and possession of said tract during his life. That the said deed was drawn by E. R. V. W., and that, if the said deed does not, as complainant believes it does not, reserve the use of the said tract to the complainant during his life, it was drawn in violation of the express understanding and agreement made by the said Naomi with the said Joanna, that the complainant should possess and enjoy the same to his death, and is a fraud on the said Joanna and this complainant. The bill prays that the said deed from the said Joanna to the said Naomi may be corrected, in conformity with the said alleged agreement, so as to reserve to the complainant a life estate in the premises ; and that the defendants may be enjoined from prosecuting an ejectment brought by them, or any other action to turn the complainant out of possession, during his life. The said Naomi and her said husband, E. R. V. W. are the only defendants. Joanna DeGroot is not made a defendant.

The answer denies that the defendants had any knowledge or information that any such agreement was entered into between the said Joanna and the complainant, or any agreement whatever by which the complainant was entitled to enjoy the said tract of land for his natural life, or any other time, except as tenant at will ; and says that the defendants are informed and believe that no such agreement was ever made or entered into between the said Joanna and the complainant. The defendants severally deny that at the time of the making and delivery of the said deed from the said Joanna to the said Naomi they had any knowledge, information or belief that the complainant had any right or interest in the said tract of land for his life, or for any other term ; or that it was understood or agreed between the said Joanna and the said Naomi that said deed was not to take effect during the life of the complainant ; or that it was any part of the agreement or understanding on which said deed was delivered that the complainant should have the use

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and possession of the said tract during his life. They deny that the said deed was drawn in any way or respect different from or in violation of any understanding or agreement between the said Joanna and the said Naomi, or different from their understanding, wishes and instructions, and they aver it was drawn according to their desire and instructions.

As to the alleged agreement or understanding between Joanna and Naomi that the deed from Joanna to Naomi was not to take effect during the life of the complainant, such agreement or understanding, if made or had, would, of course, be known to Naomi. She denies that any such agreement or understanding was made or existed. The answer upon this point of the case is a sufficient denial of the bill. It must be taken, then, for the purposes of this motion, that the deed from Joanna to Naomi was made as it was intended to be made. Joanna intended to convey, and did convey, by the deed to Naomi, the fee, making and intending to make no reservation of or provision for any interest in the premises to or in favor of the complainant. She may have relied that Naomi, being the daughter of the complainant, and her husband would not turn the complainant out of possession, but would permit him to occupy the premises during his life; and something may have passed between her and Naomi, before or after the delivery of the deed to Naomi, which gave her confidence in this respect; but she made an absolute deed, and imposed no obligation on Naomi. And her making an absolute deed must be considered as an assertion on her part that she had the right to do so, and a denial of any interest in the premises in the complainant, or any other person, interfering with her right to do so. The question, then, as to the propriety of dissolving or retaining the injunction, is to be determined upon the bill and answer in relation to the agreement alleged in the bill to have been made between Joanna and the complainant. Such an agreement might have existed and not be within the direct and positive knowledge of the defendants; and if Joanna had been made a party defendant, the answer of Naomi and her husband that they had no knowledge of any such agreement, and were informed and believe that no such agreement existed, would not have been sufficient to dissolve the injunction.

Joanna should have been made a defendant. The complainant denies her right to convey the property without reserving a life estate therein to him, and calls, in his bill, for a correction of the deed from Joanna to Naomi, so as to reserve or to procure for him such life estate. But he omits to make Joanna a defendant; gives her no opportunity of answering his allegation; deprives the defendants of the benefit of the answer of Joanna; and calls only on Naomi and her husband for an answer as to the alleged agreement between him and Joanna.

The complainant has chosen to test only the consciences of Naomi and her husband as to this matter: he has not chosen to test the conscience of Joanna. Under these circumstances the answer of the defendants that they have no knowledge of any such agreement between Joanna and the complainant, and that they are informed and believe that no such agreement existed is a sufficient answer to the bill. The complainant knew that this was all the answer the defendants could give, and has omitted to make a defendant one who should have been made a defendant, and who could answer from her own knowledge to the existence or non-existence of such an agreement.

The correctness of this view appears, in this case, from the fact that the affidavit of Joanna, taken on the part of the complainant, and which was read subject to the opinion of the court whether it could be considered on this motion, does not sustain the allegation of an agreement between Joanna and the complainant as stated in the bill; but disproves it.

Injunction dissolved.

PETER T. SMITH and others vs. BROWN and HANSON.

A bill had been filed against "The Trenton Delaware Falls Company," on the ground of insolvency, on which Receivers had been appointed, and a sale made, by the Receivers, of all the real estate of the Company, free from all incumbrances. The proceeds were ordered to be paid in discharge of incumbrances, according to the priority thereof. The Trenton Bank held mortgages on all the real estate of the Company. The Falls Company, after giving the mortgages to the Bank, and before the filing of the said bill, sold a part of their real estate, all of which was so mortgaged to the Bank, to B. and H. The Bank bought at the Receivers' sale all the real estate then held by the Falls Company; and received from the proceeds of the sale the full amount of their incumbrances; and the proceeds of the sale were not sufficient to pay P. T. S. the amount of a judgment obtained by him subsequent to the mortgages held by the Bank, and subsequent to the sale by the Falls Company of a part of their real estate to B. and H. P. T. S. filed a bill against B. and H., to compel them to contribute towards the payment of his judgment so much as would have been a just proportion of the amount of the mortgages held by the Bank to be paid out of the lands so sold to B. and H., and which were covered by the mortgages to the Bank. After the filing of this bill, and after answer and replication filed and evidence taken, P. T. S. caused an execution to be issued on his judgment, and caused a sale to be made by the Sheriff of all the real estate of the Falls Company which had been so sold by the Receivers; under the idea entertained by his counsel that the said sale by the Receivers was void. At this sale the Bank bid a sum sufficient for the payment of the judgment of P. T. S.; and the Sheriff struck off the property to the Bank, and gave the Bank his Sheriff's deed for it; and the judgment of P. T. S. was paid with the money received by the Sheriff from the Bank on this sale. A motion was then made, on behalf of B. and H., that the said bill of P. T. S. be dismissed with costs. The court dismissed the bill without costs.

In 1843, a bill was filed by Peter T. Smith and others, judgment creditors of "The Trenton Delaware Falls Company," under the "Act to prevent frauds by incorporated companies," on the ground of the insolvency of the said Company; and Receivers were appointed; and a sale was made by the Receivers of all the real estate of the Company, free from all incumbrances. The proceeds of the sale were ordered to be paid in discharge of incumbrances according to the priority thereof. The Trenton Bank held mortgages on all the real estate of the Falls Company. The Falls Company, after giving the mortgages to

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the Bank, and before the filing of the said bill, sold a part of their real estate, all of which was so mortgaged to the Bank, to Brown and Hanson. The Bank bought at the Receivers' sale all the real estate then held by the Falls Company; and received from the proceeds of the sale the full amount of their incumbrances; and the proceeds of the sale were not sufficient to pay the judgments of the said Peter T. Smith and others, or either of them. Peter T. Smith then filed the bill in this case, against Brown and Hanson, to compel them to contribute, towards the payment of his judgment, so much as would have been a just proportion of the amount or the mortgages held by the Bank to be paid out of the lands so sold to Brown and Hanson, and which were covered by the mortgages to the Bank. After the filing of this bill, and after answer and replication filed and evidence taken, Peter T. Smith caused an execution to be issued on his judgment against the Falls Company, and caused a sale to be made by the Sheriff of all the real estate of the Falls Company which had been sold by the Receivers; under the idea entertained by his counsel that the said sale by the Receivers was void. At this sale the Bank bid a sum sufficient for the payment of the judgment of P. T. S., and the Sheriff struck off the property to the Bank, and gave the Bank his Sheriff's deed for it; and the judgment of P. T. S. was paid with the money received by the Sheriff from the Bank at this sale. A motion was then made, on behalf of Brown and Hanson, that the said bill of Peter T. Smith be dismissed with costs.

S. G. Potts and *P. D. Vroom* in support of the motion.

W. Halsted resisted the payment of costs. He cited *Halst. Dig.* 634, 5; 9 *Ves.* 209; 8 *Ib.* 381, 6, 396; 1 *Story's Eq.*, sec. 634, 643, 651; 1 *John. Ch.* 413; 4 *Russell*, 326; 3 *Cond. Eng. Ch.* 697; 2 *Green's Ch.* 272; 3 *Barb. & Harr. Eq. Dig.*, sec. 40; 4 *Ib.* 124, 200, 508, sec. 14.

THE CHANCELLOR. The bill was not demurred to, but an answer was put in. The defendants do not in their answer allege that the sale by the receivers was void. If the receivers'

sale was good, the question whether the defendants should contribute towards the payment of the judgments of the judgments of the complainants is a question to be settled on the final hearing, on the pleadings and proofs; and a motion to dismiss could not now be entertained on any ground appearing in the cause. Both the bill and the answer proceed on the ground that the receivers' sale was valid. But since the filing of the answer the complainants have adopted a course of proceeding founded on the idea that the receivers' sale was void, or, at least, that the purchasers at the receivers' sale would be willing to pay for a sheriff's deed, under execution at law issued on the judgments of these complainants, enough to satisfy those executions, rather than meet the question of the validity of the receivers' sale. They issued executions on their judgments, and under them advertised and exposed to sale all the land sold by the receivers, as still the land of the Falls Company, the defendants in their judgments and executions; and at that sale the persons who bought those lands at the receivers' sale bid, for a title to them from the Sheriff under those judgments and executions, enough to pay the debts of the complainants.

The questions now raised are, whether the complainants shall be permitted to go on with the suit in this court, after they have made their debt at law, for the purpose of recovering from the defendants in this suit the costs which the complainants have incurred on this court; and, if not, whether the defendants in this suit are entitled to costs against the complainants.

It is a case without parallel; and without rule, other than that of discretion; because I cannot determine whether the complainants should be permitted to go on here for their costs without determining whether the receivers' sale was valid or not; and this is a question not raised by the pleadings. If the receivers' sale was valid, then the course of the complainant's in filing their bill was the only course left for them to try; and I cannot, on bill, answer and replication, hear a motion to dismiss for anything appearing on the pleadings. The complainants have made their money by executions at law; but that does not settle the question—whether the receivers' sale was valid or not; and therefore does not settle the

question of the propriety of the filing of the bill when it was filed. The purchase made under the executions, by the persons who had previously bought at the receivers' sale, does not establish that the receivers sale was void; and therefore does not establish that these judgment creditors had a clear remedy without coming into this court by bill against these defendants for contribution. I cannot, on motion to dismiss the bill on the ground that the complainants have made their money at law, determine that the receivers' sale was void, and that therefore the complainants had no ground for coming here when they filed their bill. The receivers' sale may be good notwithstanding the purchasers also bought at the sheriff's sale under the executions. I have now, therefore, no rule to go by in determining whether the bill was properly filed or not when it was filed, and no rule by which to determine whether the defendants should be allowed costs if the suit now stops.

The motion to dismiss the bill with costs is founded on the idea that these judgment creditors had an ample resort to make their money on their executions, and should not have come into this court at all; that there was no reason for calling on these defendants for contribution. Nothing which has been done establishes this. I do not see how I can give the defendants costs. On the other hand, I do not think that the complainants are entitled to go on in this cause for the mere purpose of getting their costs. They could only get costs in this suit on the ground that the receivers' sale was good, and that therefore, having no other remedy, or any property to look to, they would be entitled to come here against these defendants for contribution. But they have proceeded by executions at law on the assumption that the receivers' sale was bad, or that, at least, it was so questionable that the purchasers at the receivers' sale would pay enough to satisfy their judgments, rather than meet the question; and they have succeeded in getting their money. Shall they now be permitted to proceed in this court on a bill which assumes the validity of the receivers' sale, for the mere purpose of getting their costs? I think not. If the defendants had set up in their answer that the receivers' sale was void, and the complainants had then issued executions at law and

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made their money, the defendants might have been entitled to their costs in this court. But the defendants in their answer affirm the validity of that sale, and I could not on the pleadings in this cause question the validity of that sale.

I see no course left but to dismiss the bill without costs.

Order accordingly.

JOHN GIHON *vs.* THE BELLEVILLE WHITE LEAD COMPANY
and others.

A bill by a subsequent mortgagee against the mortgagor and prior mortgagees neither admitted nor denied the prior mortgages; and its prayer was, that the mortgagor be decreed to pay the complainant's mortgage, or that, in default thereof, the mortgagor and prior mortgagees be barred and foreclosed from all equity of redemption; and that the mortgaged premises be sold, and that out of the proceeds the complainant might be paid the amount of his mortgage; and for such other and further relief, &c. A demurrer filed by the prior mortgagee was allowed.

A bill by a subsequent mortgagee, making a prior mortgagee a party, may pray a sale of the interest mortgaged, a sale subject to the incumbrance of the prior mortgage; or, that he may be permitted to redeem the prior mortgage and have the premises sold to pay such redemption money and his own mortgage; or, that the mortgaged premises may, if the prior mortgagee consent thereto, be sold, and that out of the proceeds the mortgages may be paid according to priority.

A prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, though he is made a defendant in the bill.

If, upon a bill by a subsequent mortgagee as usually drawn here, the prior mortgagee takes such a course, either by answer, or by putting in his mortgage before the Master, as shows his consent, the mortgaged premises will be ordered to be sold, and the mortgages directed to be paid according to priority.

Bill filed January 3, 1848, stating that, on the 1st Dec. 1846, Horatio N. Fryatt and Geo. W. Campbell gave their bond to Jas. McCullough, conditioned for the payment of \$30,000, in one year, with interest semi-annually; and that, to secure the payment of the said bond, the said Fryatt, with his wife, and the said Campbell, with his wife, on the same day, gave a mortgage to McCullough on the property in the bill described. That this mortgage was acknowledged on the 3d, and recorded on the 8th Dec. 1846. That on the 10th Dec. 1846, McCullough assigned the said bond and mortgage to John Gihon, the complainant. That since the date of the said bond and mortgage, and on or about March 15, 1847, the said Fryatt and Campbell, with their respective wives, conveyed the said premises to "The Belleville White Lead Company."

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That prior to the giving of the mortgage before mentioned, and on the 1st April, 1845, John B. Hinton and Jas. A. Moore, being or pretending to be seized of the premises, gave a mortgage thereon to John Day, to secure the payment of \$12,000, which mortgage is recorded, &c.; and which was afterwards assigned to Henry Ellsworth; but whether the same is unpaid this complainant is not informed, and neither admits or denies, but leaves the party setting up and claiming the same to such proof as the law and this court shall direct.

That after the execution of the last mentioned mortgage, and before the execution and delivery of the mortgage held by the complainant, the said Hinton and Moore, with their wives, executed and delivered a mortgage on the same premises to "The President, Directors and Company of the Union Bank," to secure the payment of \$41,442.76; but whether the same be satisfied or is still a lien upon the said premises the complainant neither admits nor denies, but leaves the party claiming the same to such proof as the law requires and this court shall direct. And that said last mentioned mortgage was and is assigned to the said Henry Ellsworth.

That, after the execution and delivery of the two last mentioned mortgages, one Evert Bancker, (to whom the said premises had before been conveyed,) on or about the 11th April, 1836, (this is probably a mistake: it should be 1846,) to secure to one Mary E. De LaMontague the payment of \$6,000, executed a mortgage on the said premises, which was registered on the 18th July, 1836, (1846); but whether the said mortgage be paid and satisfied, in part or in whole, the complainant is not informed and cannot tell; and whether and to what amount it is a lien on the premises the complainant neither admits nor denies but leaves the parties interested therein to such proof as the law requires and as this court shall direct. That, on or about Oct. 26, 1839, Henry S. Dodge and his wife, to which Henry S. Dodge the said premises had before been conveyed, executed and delivered to Mary E. De La Montague a mortgage on the premises to secure the sum of \$4,500; which mortgage is recorded; but whether it is still a lien on the prem-

ises, or to what extent, the complainant neither admits or denies; but leaves, &c. (as before) That the said Fryatt and Campbell and the said "The Belleville White Lead Company" have at all times possessed and enjoyed, and still do possess and enjoy the said premises.

That the complainant has frequently applied to the said Fryatt and Campbell and requested them to pay him the principal and interest due to him on his said mortgage.

But now so it is, that the said "The Belleville White Lead Company," Henry Ellsworth and Mary E. De La Montague, combining, &c., pretend (among other pretenses stated) that there are other incumbrances upon the said premises, prior to the complainant's said mortgage; but when given, and to whom, or for what consideration, or what is the nature thereof, they refuse to discover; whereas the complainant charges that there are no such prior incumbrances as is pretended, or, if any such do exist, they are fraudulent and void as respects the complainant, or have been paid off and satisfied, and are kept on foot for fraud, to the injury and prejudice of the complainant, who had no notice thereof, and ought to be decreed to be delivered up to be cancelled, or declared to be of no effect against the complainant. The bill prays, that the said "The White Lead Company," to whom the premises have been conveyed by the said Fryatt and Campbell since the giving of the complainant's mortgage, may be decreed to pay the principal and interest due on the complainant's mortgage, by a short day; and in default thereof that the said "The Belleville White Lead Company," Henry Ellsworth, and Mary De La Montague may be barred and foreclosed of and from all equity of redemption or claim of, in and to the premises so mortgaged to the said James McCullough by the said mortgage assigned by him to the complainant; and that the said premises may be sold; and that out of the moneys arising from the sale the said complainant may be paid the principal and interest due on his said bond and mortgage.

"The Belleville White Lead Company," Henry Ellsworth and Mary E. De La Montague are made defendants.

To this bill Henry Ellsworth demurred ; and for the cause of demurrer shows, that it appears, among other things, by the said bill, that the same was filed to foreclose a certain mortgage given by Fryatt and Campbell, with their wives, to McCullough, and by him assigned to the complainant ; and that the complainant seeks also, by said bill, to foreclose a mortgage made by Hinton and Moore and their wives to John Day, and by said Day assigned to Henry Ellsworth, this defendant, and a mortgage made by said Hinton and Moore to "The President, Directors and Company of the Union Bank," and assigned by the said Bank to Henry Ellsworth, this defendant, which said mortgages are, as appears by the bill, incumbrances prior to the complainant's mortgage ; which the complainant has no power to do."

And for further cause of demurrer he shows, that the bill does not admit the validity of the mortgages held, as set forth in the bill, by this defendant, nor offer to redeem the same, nor pray any redemption ; but seeks to contest the validity of the said mortgages in this court.

And for further cause of demurrer he shows, that the complainant, in and by his said bill, seeks to foreclose the mortgages of this defendant set forth in the bill, and sell the mortgaged premises discharged of the same, without the consent of this defendant and against the will of this defendant.

And for further cause of demurrer shows, that the complainant shows no title to any discovery from or relief against this defendant ; and can only foreclose and sell the said mortgaged premises, under the said mortgage held by the complainant, subject to all liens and rights of this defendant by virtue of his said prior mortgages. And that the said bill is multifarious, and joins distinct matters together which ought not to be united in one bill.

And, lastly, that the complainant has not by his bill shown any ground of equity to entitle him to the relief sought against this defendant.

Wm. M. Scudder in support of the motion. He cited 1 *Green's Ch.* 396, 401 ; *Seaton's forms*, 172, note, 167, 8 ; 11

Wheat. 304; 1 *Paige*, 284; 4 *Eq. Dig.* 443, sec. 18; *Ib.* 453, sec. 11; 3 *Edw.* 106; *Rev. Stat.* 917, 18, sec. 64, 65.

*J. Chetwood contra.*¹

THE CHANCELLOR. A prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, though he is made a defendant in the bill. The interest mortgaged to a subsequent mortgagee is an interest subject to the prior mortgage. The subject matter of the subsequent mortgage is the property or interest which the mortgagor has remaining in him after having given the first mortgage. This interest thus mortgaged to the subsequent mortgagee is an interest well known and understood, and may be foreclosed or sold under the decree of this court, on a bill by the subsequent mortgagee against the mortgagor of that interest. The subsequent mortgagee, on filing a bill for the foreclosure or sale of that interest, is not bound to make the prior mortgagee a party to his proceeding.

The prior mortgagee, though made a defendant, and served with process in the suit of the subsequent mortgagee, may take no notice of that suit, and file his bill on his own mortgage, and make the subsequent mortgagee a party. This is so from the nature of the different interests mortgaged. If it were not so, the control of the first mortgagee over his own securities, as to the time when he will enforce them, and as to the time and mode of selling the property on execution, might be taken away from him by any person who might choose to make a loan and take a mortgage subject to his.

The subsequent mortgagee may file a bill either for a foreclosure and sale subject to the prior mortgage, or a bill to redeem the prior mortgages and for a sale to raise the redemption money and the amount of his own mortgage; or, if he files a bill and makes the prior mortgagee a party, and makes the proper prayer, and the prior mortgagee, by the course he takes in that cause, consents to it, the court may make a decree for the sale of the property, and that out of the proceeds the mortgages be paid according to priority.

In this case the bill is filed by a subsequent mortgagee and the prior mortgagee is made a party defendant. He need not have noticed the proceeding at all. But he filed a demurrer to the bill; and one cause of demurrer assigned is, that the complainant asks to have the mortgaged property sold, and to be paid the amount of his mortgage out of the proceeds of the sale.

I think the bill and the prayer of it are not properly framed. It neither admits nor denies the prior mortgages; and its prayer is, that the mortgagor be decreed to pay the amount of the complainant's mortgage, or that, in default thereof, the mortgagor and prior mortgages may be barred and foreclosed from all equity of redemption or claim of, in and to the mortgaged premises; and that the mortgaged premises may be sold, and that out of the proceeds he may be paid the amount of his mortgage; and for such other and further relief, &c. The facts stated in his bill do not entitle him to either branch of the specific relief prayed; nor to any relief under the general prayer. What he can not get without the consent of the prior mortgagee he may properly be said not to be entitled to. He has neither prayed that the equity of redemption mortgaged to him may be sold, or that he may be permitted to redeem.

A man holding a subsequent mortgage may file a bill stating that a prior mortgage has been given, and setting up that it is fraudulent, or void, or has been paid, and ask to have it so decreed, and make the person holding it a party, and ask to have the premises sold to pay the mortgage; and if he shows that the prior mortgage is void, or has been paid, it will be put out of his way. But if it turn out that the prior mortgage is good, the mortgaged premises cannot be sold to pay the prior mortgages without the consent of the prior mortgagee; all that the subsequent mortgagee could sell, without the consent of the prior mortgagee, would be the equity of redemption mortgaged to him. I do not consider this a bill of that character. The complainant sets out the prior mortgages, and says, as to each of them, that he neither admits nor denies it. He then says, that the mortgagor and prior mortgages, combining, &c., pretend that there are oth

er incumbrances, prior to his mortgage ; whereas he charges there are no such prior incumbrances as is pretended, or, if any such do exist, they are fraudulent and void as against him, or have been paid off, and ought to be decreed to be delivered up to be cancelled or declared to be of no effect against him.

This cannot be considered as a bill attacking the validity of the mortgages which the complainant has set out in his bill as prior to his, and which he says he neither admits nor denies. The stating part of the bill shows nothing against the validity of those mortgages ; makes no allegation of any facts or circumstances on which the complainant relies as a ground on which to contest their validity.

As a bill in the other aspect, *i. e.*, with a view of obtaining a sale of the mortgaged premises to pay the mortgages according to their priority, the bill is defective. It prays for nothing to which he would be entitled as a subsequent mortgagee.

A bill by a subsequent mortgage, *i. e.*, a mortgagee of the equity of redemption, may pray a sale of the interest mortgaged to him, a sale subject to the incumbrance of the prior mortgage ; or, that he may be permitted to redeem the prior mortgage and have the premises sold to pay such redemption money and his own mortgage ; or, that the mortgaged premises may, if the prior mortgagee consent thereto, be sold, and that out of the proceeds the mortgages may be paid according to priority.

But if the prior mortgagee refuses to consent to a sale on his mortgage, the complainant on the subsequent mortgage must take one of the other modes of relief prayed.

He can at least obtain a sale subject to the incumbrance of the prior mortgage.

If upon a bill by a subsequent mortgagee as usually drawn here, the prior mortgagee takes such a course, either by answer, or by putting in his mortgage before the master, as shows his consent, the mortgaged premises will be ordered to be sold, and the mortgages directed to be paid according to priority.

The complainant in this case asks nothing which he is

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entitled to as against the prior mortgagees, and therefore should not have brought them into court.

Demurrer allowed; with leave to amend.

Order accordingly.

CITED in *Potts v. N. J. Arms and Ordinance Co.*, 2 C. E. Gr. 518; *Bigelow v. Cassidy*, 11 C. E. Green 561.

LUCIUS B. NUTTING *vs.* CHRISTOPHER COLT, Jun.

A person employed by another in a manufacturing establishment at a salary of \$500 a year and one-fourth of the profits is not a partner.

A. employed B. in a manufacturing establishment at an annual salary of \$500 and one-fourth of the profits, and B. agreed that A. might use his name as a partner in the business if A. should deem it advisable. The name of A. & Company was assumed. Afterwards, A. being about to create a lien on property in the establishment, B. gave a written certificate in which he stated that he, "one of the firm of Colt and Company," did not possess any interest in the property used by the Company, and did not claim any right in or to the same on account of his being a partner of the Company or on any other account. A. thereupon gave a mortgage on property in the establishment to secure acceptances of drafts to be drawn in the name of A. and Company. B. afterwards filed a bill against A. stating that he was a partner, and charging that A. had received large sums and applied them to his own use, and kept no proper accounts thereof, and refused to account to the complainant; and prayed an injunction, and the appointment of a Receiver. The injunction was allowed.

On answer, the appointment of a Receiver was denied; and the injunction was dissolved.

On the 29th June, 1847, the following article was entered by and between Christopher Colt, Jun., and Lucius B. Nutting. "Memorandum of an agreement made the 29th June, 1847, between Christopher Colt, Jun., of Paterson, New Jersey, of the one part, and Lucius B. Nutting, of Dedham, Massachusetts, of the other part. Said Colt agrees to employ said Nutting as a Silk Dyer and Manufacturer, at Paterson aforesaid, for the term of one year, with an understanding that the same is to be continued to five years if mutually agreeable, at an annual salary of \$500 and one-fourth of the profits of the dyeing and manufacturing establishment in which he is employed. Salary to be drawn as often as he may want, when due him. Said Nutting agrees, on his part, to devote all his time and attention to the best interest of the dyeing and manufacturing department, and to commence for said Colt the 5th day of July,

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1847; and to have his name used as a partner in said business should said Colt deem it advisable."

Nutting entered into his employment, under the said article, at the time therein specified.

The name of Colt and Company was assumed as the name under which the business was carried on.

On the 2d October, 1847, Colt being about to execute a writing creating a lien on the property in the silk manufactory, Mr. Hopper, a counselor at law in Paterson, who was to draw the necessary papers, knowing, as he says in his testimony, that the business was carried on in the name of Colt & Company, told Mr. Colt that if any other person was concerned with him in the business it was necessary that such other person should execute the papers with him. Mr. Colt, in answer, said that Mr. Nutting was in the mill with him, but had no interest in any of the property. Mr. Hopper then told Colt that, to avoid all question on that subject, he wished to have Mr. Nutting's signature to that effect. Colt requested Mr. Hopper to draw up such a paper as he wanted signed by Nutting and he would get Nutting's signature to it. Mr. Hopper accordingly drew a writing in these words: "This is to certify that I, Lucius B. Nutting, one of the firm of Colt & Company, carrying on the business of silk manufacturing at Paterson, New Jersey, do not hold or possess any interest in the machinery, or any of the property used by the said company, or the silk, raw or manufactured; and do not claim to have any right or title in or to the same on account of my being a partner of the said company or on any other account whatever. Witness my hand this 2d day of October, 1847."

This writing was signed by Nutting and returned by Colt to Mr. Hopper; and Hopper then drew a mortgage on the property in the mill from Colt to Robert Morell, to secure him for acceptances of drafts to be drawn in the name of "Colt & Company," to be used in the purchase of silk and materials for carrying on the said silk manufacturing business. The mortgage was executed and delivered. On the 20th December, 1847, Nutting exhibited his bill stating, that on the 29th June, 1847, he agreed with Colt to become

a partner with him in the business of manufacturing, twisting and dyeing silk ; and that thereupon a certain agreement was made between them [setting out the agreement above set forth]. That said business was entered into and carried on by them pursuant to the provisions of the said agreement, and still continues. That Colt has been in the habit of receiving large sums of money, and of drawing all checks, drafts and notes on the partnership account ; but that he has not duly entered all such transactions in the partnership books of account ; but hath entered therein a part only of said transactions, and has kept the complainant in ignorance. That Colt has, from time to time, applied to his own use, from the receipts and profits of the business, large sums of money exceeding the proportions thereof to which he was entitled, and refuses to come to a settlement with the complainant. The bill states that Colt has greatly mismanaged the business, in raising large sums on the bills, notes and drafts of said firm at high rates of interest : and that Colt has applied the assets and effects of the firm to his own private use, to an amount beyond what he is entitled to. That the firm is indebted in large sums to different persons, and that said debts are now due. That upon a settlement of the accounts between them it will appear, that a large balance is due from the defendant to him in respect to said partnership dealings ; but that nevertheless Colt is proceeding to collect the partnership debts and apply the same to his own use ; which the defendant is enabled to do by means of his having possession of the books of account, and all the silk manufactured being carried to his house as soon as made.

The bill prays an injunction restraining Colt from collecting and receiving any of said partnership debts and moneys ; and the appointment of a receiver ; and a dissolution.

An injunction was allowed.

On the 5th February, 1849, Colt put in his answer ; and a notice was given of a motion to dissolve the injunction. A notice was also given, on the part of the complainant, of a motion to be made, on the same day, for the appointment of a

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receiver; and also of a motion for an attachment for an alleged breach of the injunction.

Depositions were read on the argument of the several motions.

B. W. Vandervoort for the complainant. He cited *Story's Eq. Jur.* sec. 846, 7, 852; 4 *Mad. Rep.* 252; 2 *Daniels Rep.* 250.

Silas D. Canfield for the defendant.

THE CHANCELLOR. The question is, whether, under the article of agreement made between the parties, Nutting has any such rights as against Colt as entitle him, under the facts in other respects stated by the bill, to prevent Colt from receiving moneys due for goods sold from this establishment; and to have a receiver appointed to receive the same, and to take charge of the other property in the establishment.

There are cases in which, upon principles of policy, persons will be held to be partners in reference to third persons who as between themselves are not partners, and have not in reference to each other the rights of partners.

Whether, under the circumstances of this case, Nutting would as to third persons be held to be a partner and liable to debts, it is, perhaps, not necessary to say.

As between him and Colt he is not a partner, but a person employed by Colt, at a salary of \$500 a year and one-fourth of the profits. 4 *Paige* 148.

Nutting was to have his name used as a partner should Colt deem it advisable. Colt assumed the business name of "Colt & Company." If Nutting's name had been used, and he thus held out as partner, he might, under such an agreement for a fourth of the profits, be held to be a partner as to creditors. *Ibid.* And if under such an agreement, Colt had thought it advisable to use Nutting's name, and had, by the use of it in connection with his, contracted debts for which Nutting thus became liable

with him, there might be an equity even in favor of Nutting, as against Colt, that the property and assets thus brought into the establishment by the credit of Nutting's name in connection with Colt's, and at the expense of Nutting's liability in connection with Colt's should, at Nutting's instance, and as against Colt, though as between them they were not in reality partners, be held reliable, in relief of Nutting, for the payment of the debt so contracted; and that Colt, if his conduct evinced a disposition, after the debts so contracted and for which Nutting thus become justly liable with him, to use and dispose of the property and assets in such way as to withdraw them from any application thereof to the payment of such debts, should be restrained from collecting the dues of the establishment, &c., and that a receiver should be appointed.

But there is nothing in his case calling for a receiver on any such ground of equity.

Nutting consented to such a use of his name as would make him liable as a partner to third persons, and yet agreed to terms by which he was not a partner as between him and Colt. This necessarily carried the idea that Colt was to have the control of the property and assets of the firm. Nutting relied on Colt's integrity and fidelity in the application of the assets to the payment of the debts that should be contracted.

There is no evidence that Colt, at the time of the application for an injunction and receiver, had betrayed Nutting's confidence. The bill says that a large amount of debts was *due*; it does not say *payable*; and the answer and depositions show, that all the drafts and acceptances which had become payable were met as they become payable; and no sufficient reason is shown for concluding that Colt, had he not been stopped from collecting, would not have continued to pay the acceptances as they became payable.

I am of opinion that there is no sufficient ground for the appointment of a receiver.

As to the matter of account, the cause can proceed for

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the purpose of ascertaining what profits have been made, with a view to the complainant's recovering his fourth part thereof.

The injunction, in this view, must be dissolved.

As to the attachment, no sufficient violation of the injunction has been shown.

CITED in *Hargrave v. Conroy* 4 C. E. Green, 281.

JOHN LEONARD and others vs. ABRAHAM SUTPHEN and others.

A commission for the examination *de bene esse* of a non-resident infirm witness may be awarded before issue joined.

The subpoena in this case was returned the first day of the present term, June term, 1849. At the time of the service of the subpoena a notice was, also, served on the defendants of an application to be made, on a day in this term more than ten days after the service or the subpoena, for a commission for the examination of a witness *de bene esse*. The affidavit upon which the commission was applied for stated that the witness resided out of the State, and was aged and infirm, and was a material witness in the cause.

The question submitted to the court was, whether a commission could be awarded before issue joined in the cause.

THE CHANCELLOR. The "Act authorizing commissions and the taking of depositions," Rev. Stat. 959, by the 1st section thereof, provides, that if a material witness reside out of the State, or, if in this State, be ancient or very infirm or about to go out of the State, a commission may be awarded to examine such witness *de bene esse*, upon interrogatories approved by the court; and, by the 10th section thereof, that the deposition taken under the commission shall be as competent evidence as if the witness had been examined on the hearing; provided it appear to the satisfaction of the court that the witness reside or is gone out of the State, or is dead, or by reason of age or infirmity is not able to attend the court, but not otherwise. A commission for an examination *de bene esse* is within the language of the statute in the case made by the affidavit, and is, also, within the spirit of the statute. Non-residence, alone, of a material witness is a sufficient ground for a commission. If issue is joined in the cause a commission will be awarded for his examination abso-

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lutely. And it would seem that by the statute non-residence, alone, is sufficient for a commission to take the examination *de bene esse*, and before issue joined.

In this case, the affidavit states, also, that the witness is aged 84 and is infirm. I see no reason why a commission should not go, before issue joined, to take his examination *de bene esse*.

Order accordingly.

CHARLES F. DURANT *vs.* DAVID A. WILLIAMSON and others.

An injunction was applied for restraining the defendants from continuing the working of steam engines in a factory near the dwelling-house of the complainant and other buildings owned by him and occupied by his tenants, on the grounds that the steam engines, when in operation, shook and injured the said buildings, and that the business carried on in the said factory was a nuisance to the neighborhood. It appeared, by affidavits read in opposition to the motion for an injunction, that the complainant had brought an action at law against the defendants for the same alleged injury, and that the jury had found a verdict for the defendants. The injunction was denied.

The bill states that the complainant, Charles F. Durant, is seized in fee and possessed of lots 33, 34 and 35 on Hudson street, in Jersey City; and has been so seized and possessed from March 3, 1834. That, in the latter part of the fall of 1846 and the winter and spring of 1847, he built on said lots 34 and 35 two three-story brick dwelling-houses; that they were completed about the 1st May, 1847, and were built in the best manner, upon foundations of stone; pains having been taken by the builder to procure firm foundations therefor; and that the said buildings are in every respect completely built and finished. That the building on said lot numbered 35 is contiguous to and adjoins the building on lot 36 on Hudson street; and that the said two buildings of the complainant and the buildings numbered 36, 37 and 38 in Hudson street have one continued front wall on the street; the said buildings numbered 36, 37 and 38 having been built prior to the time when the complainant built his said two buildings numbered 34 and 35, the said buildings being built partly on the site of another building which had theretofore stood on lot 34, and which was burned down in the early part of 1846. That the said building which was burned down was one of four brick buildings which were built together at the same time and with one continuous front wall, about 42 years ago, on said lots 34, 35, 36 and 37 on Hudson street, and were put up and used for commercial purposes. That the said lot 33, being

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on the corner of Hudson and Sussex streets, is in part a vacant lot, and has been and is used by the complainant as a court yard and entrance to the building wherein the complainant resides and for 14 years past has resided, and which last mentioned building is situated on the rear of the said lots of the complainant, and has been built for the period of about 30 years. That he caused the said buildings so built by him on lots 34 and 35 to be built and finished in the best manner, intending to rent them to gentlemen, the situation being peculiarly pleasant, and, as he believes, the best in the vicinity, and the neighborhood well built up with private residences, many of which are of the best class, and that part of the city being densely populated. That after the said two houses were so built by the complainant, and in or about Nov. 1848, David A. Williamson, Edward H. Mann and Charles T. Griffith, doing business under the name and firm of Williamson, Mann & Co., entered into the occupation of the building numbered 37 in Hudson street, and have ever since remained in possession thereof, and still occupy the same, ostensibly as a coffee and spice mill, but in reality as a place for the drying and grinding of drugs of the most nauseous character, as well as for burning and grinding of peas, coffee and spices. That at or shortly before the commencement of such occupancy of said building 37 by said Williamson, Mann & Co., and after the complainant built his said two dwelling-houses, it was raised to five stories, it having been, up to that time, three stories. And the said Williamson, Mann & Griffith, upon such occupancy thereof by them, put into the said building certain machinery, consisting of six run of grindstones, distributed throughout said building, and which were driven by a steam engine placed by them in a building situated immediately in the rear of said building so occupied by them. That ever since their said occupancy of said building they have caused, and still do cause to be run the said machinery, or some part thereof, in the said building so occupied by them; and that the operation of the said machinery continually shakes and jars the said two houses of the complainant on lots 34 and 35. That said jarring and shaking is so great that it constitutes a great, and to many persons an insuperable objection to the occupancy

of said houses ; the said machinery being run, with more or less severity, every day except Sunday, from about 7 A. M. to 6 or 7 P. M., with but little if any intermission ; and, when in operation, causing the doors and windows of the complainant's said houses to rattle continually ; and causing loose articles of furniture, fenders, mantel ornaments, cups and saucers on a table to rattle and keep constantly in motion ; the motion of the said houses caused by the operation of the said machinery of the defendants being so great as to be perfectly perceptible to a person seated on a chair placed on the floor thereof, and rendering the said houses far less desirable as places of residence than they would otherwise be ; insomuch that some of those who have occupied the complainant's said houses, and other disinterested and judicious persons acquainted with the effect of said machinery on the complainant's said two houses and with the nuisance of stench occasioned there by the business carried on by the said defendants in said building occupied by them and hereinafter mentioned, have publicly declared that they would not reside in the complainant's said houses rent free, and that their objection is founded solely on the fact of the said jarring and shaking and the said other nuisance of said stench.

That the defendants have, also, ever since their occupancy of said factory, carried on, and still carry on, in said building occupied by them, a business (being, as the complainant verily believes, the grinding of nauseous drugs,) which has caused and still does cause stench of the most disgusting and nauseating character to pervade, for a great part of the time, the said two dwelling-houses of the complainant and also the said dwelling-house of the complainant occupied by him and his family. And that the complainant believes and charges, that a considerable portion of the business carried on by said Williamson, Mann & Griffith in the said building occupied by them is the drying and grinding of drugs, many of which are of the most offensive and disagreeable character.

That, by reason of the said shaking and jarring and the said disgusting, nauseous and obnoxious stench, the tenants of the complainant occupying the said houses numbered 34 and 35 have been and are, both in sickness and health, ex-

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ceedingly offended and annoyed; and the complainant and his family, in his said dwelling-house occupied by them, have been and are greatly annoyed, disturbed and offended by the said foul, noxious and noisome stench.

That, by reason of the said jarrings and shakings of the complainant's said two buildings numbered 34 and 35, the said buildings have been and are, as the complainant verily believes, greatly injured; and the complainant hath thereby sustained and still does sustain very considerable damage in not being able, on account thereof and of the other nuisance of said stench, to get as much money for the renting thereof as otherwise he would have done, and also in the deterioration of the said buildings by the jarring and shaking the walls thereof as aforesaid.

The bill prays an injunction restraining the defendants from running their said machinery in the building occupied by them in such manner as in anywise to jar or shake or otherwise interfere with the complainant's said dwelling-houses or either of them, and from causing, permitting or suffering any foul, noxious, nauseous, disgusting, noisome or hurtful smells, odors or stench to arise from said building and premises occupied by the defendants and pervade the complainant's said dwelling-houses and the atmosphere in and about the same.

This bill being presented, and a preliminary injunction asked, the court ordered notice of the application to be given to the defendants.

At a subsequent day the parties appeared, and, the bill being again read, affidavits were read on the part of the defendants in opposition to the motion for a preliminary injunction.

The affidavit of Williamson and Griffith, two of the defendants, states, that the building occupied by Williamson, Mann & Griffith is one of four stores which, they are informed by old residents of Jersey City, were built about 1806, and were first occupied for commercial purposes, and that for some 20 years last past they have been used for manufacturing purposes; that the building occupied by the defendants was used at one time as a

ship bread bakery ; that it was afterwards used as a foundry and blast furnace and turning mill which was driven by a steam engine.

That the dwelling-houses of complainant on Hudson street are erected on the site of one of the stores built in 1806 ; that it was burned down some two years ago ; that when it was burned and before, it being then owned by complainant, an oakum factory was carried on there, driven by steam power.

They say that the store No. 36 Hudson street, the store next south of the one occupied by them, and between them and the complainant's dwelling-houses on Hudson street, is occupied by Mr. Deen as a tobacco factory driven by horse power. That they have been informed by Deen and others that it has been so occupied as a tobacco factory for 12 or 13 years last past. They say there is an extensive oil manufactory on the next block below on Hudson street and opposite the complainant's house ; that it produces a very disagreeable smell in the neighborhood ; that they frequently use rancid oil in that factory. That they are informed and believe that said oil factory has been located there for 17 years past ; and that there was a patent leather factory in Sussex street opposite the complainant's house which was burned down some time since.

They further say that there is a large soap factory in York street, about half way up the block from Hudson street, and that this factory produces a very disagreeable smell.

That they formerly carried on their factory at No. 67 and 69 Washington street, New York. That the reason of their removing their factory to Jersey City was their being burnt out in June, 1847. That they leased of Mr. Coles the building they now occupy, and he commenced fitting it up for their accommodation in June, 1847. That they expended in fitting up this factory, in machinery and other fixtures and apparatus, upwards of \$10,000, in addition to expense incurred by Mr. Coles in putting the building in order for them. That they carry on an extensive business, and employ constantly some twenty or thirty men. That it would be a great and irreparable injury to them to suspend their factory. That they would not stop for \$100 a day.

They deny that there are any noisome stenchs or smells produced by their manufactory, or any disgusting or nauseous smells, or any noxious or foul smells produced by their said factory, that can in any way injure or annoy the complainant and those occupying his dwelling-houses. And, to the best of their knowledge, they deny that they have injured the houses of the complainant by shaking or jarring the same. That the complainant's houses are built on reclaimed land; and if the walls are cracked it is owing to the nature of the ground on which the foundation is laid. That the fronts of the said houses adjoining the defendants' factory are covered with stucco plastering, that they have examined this plastering and cannot perceive that it is at all cracked. That they have been informed by competent judges and believe that the complainant's houses adjoining their manufactory are cheap, slightly built houses; that they are lightly timbered, and are shaken by carriages and carts passing over the pavements in front. They say that the house in which the complainant and his family reside is situated on Sussex street, at some distance from their factory, and cannot possibly be affected by the machinery in their factory. That that part of Hudson street in which their factory is located is used and occupied for the most part by manufactories, shops, stores, lumber yards, coal yards and the like purposes, and is an appropriate place for their business to be carried on. That the complainant's houses in Hudson street were built on the site of a storehouse and manufactory; that he well knew that he was building his said dwelling-houses in a locality devoted to commercial and manufacturing purposes. That Hudson street is the main business street in Jersey City: that it is the front street on the river. That the two houses of the complainant are the only houses fronting on Hudson street, between Grand street and the corner of Hudson and Morris street, except one on the corner of Sussex street.

That they verily believe the complainant has not lost any rent in consequence of their manufactory. That one of complainant's houses on Hudson street has been constantly occupied by the same person, and, as they are informed and believe, at the same rent, and that both of complainant's houses are rented.

That the complainant, after an unsuccessful attempt and application to the grand jury of Hudson county, to have the defendants indicted, in May, 1848, commenced an action at law for the same alleged injuries set out in his bill in this cause, as will appear by his declaration filed in that suit, a copy of which is annexed to their affidavit. That the said cause came on for trial at the November term of the Hudson Circuit Court, before the chief justice; and that the jury, upon the same case as that set out in the complainant's bill, (as will appear by the state of the case settled before the chief justice and signed by the attorneys of the parties, to be used on the argument of a motion for a new trial, a true copy of which is annexed to their affidavit,) found that the complainant was not entitled to any damages, he not having sustained any injury from the defendants said factory. They further say that the complainant has commenced another action against them, laying his damages at \$5,000, the writ in which action was returnable to the February term, 1849, of the Hudson Circuit Court. That the defendant Mann is absent in Europe.

The affidavits of a number of other persons residing in the neighborhood were procured, going to show that no bad smell proceeded from the factory of the defendants; and that there was no jarring of buildings in the vicinity.

The defendants also put in a plea that the alleged wrongful acts set forth in the bill have been tried by a jury in an action of trespass on the case brought by Durant against Williamson; and that the jury found a verdict of not guilty.

A motion for a new trial in that case is still pending.

Runyon and *G. A. Vroom*, in support of the motion for injunction. They cited *Story's Eq. Jur.* sec. 95; *Jeremy's Eq.* 309; 2 *Story's Eq. Jur.* sec. 925, 6; 3 *Daniels Pr.* 322; 9 *Paige*, 575; 2 *Car. and Paine*, 485; 1 *Burr.* 337; 2 *Selw, N. P.* 1105; 4 *Bingh. New Cases* 1016; 5 *Scott*, 500; 2 *Ib.* 174.

W. Rutherford contra. He cited 1 *Smith's Ch. Pr.* 240; 13 *Ves.* 167; 3 *P. Wms.* 395; 2 *Atk.* 113; 17 *John. Rep.* 93;

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100; 1 *Green's Ch.* 57; 3 *Ib.* 245; 3 *John. Ch.* 287; 3 *Green's Ch.* 234, 236, 355; *Metcalf* 118; *Eden on Inj.* 236; 327; 6 *John. Ch.* 19; *People v. Cunningham*, 1 *Denio*; 1 *Halst. Ch.* 324; 9 *Paige*, 504; 19 *Ves.* 350; 1 *Honk.* 599; *Drury on Inj.* 246.

THE CHANCELLOR. In the present state of the proceedings at law I am unwilling to grant a preliminary injunction.

Without reference to the proceedings at law I should doubt whether a preliminary injunction should be allowed. It is a case for proofs on both sides, the remedy sought is perpetual injunction.

Motion denied.

EZRA PARKHURST vs. JOSIAH F. MUIR.

To a bill by one of two partners against the other for an account, the bill saying nothing of any settlement having ever been made between them, the answer set up a settlement up to a certain time, and gave an account since the settlement ; and the complainant's solicitor took an order of reference to state the accounts.

Held, that the Master could not disregard the settlement.

A bill was filed by Ezra Parkhurst against Josiah F. Muir for the dissolution of the partnership of which they were the only members ; and for an account of the partnership transactions ; and for the appointment of a receiver. Nothing was said in the bill of any settlement having ever been made between them.

The answer set up a settlement between them up to a certain time, and gave an account of the partnership transactions since that settlement. A motion was made for a receiver, which was denied. And thereupon the complainant's solicitor took an order of reference to a master to state the accounts. When the parties appeared before the master the complainant's counsel insisted that the master should state the accounts from the beginning of the partnership. The counsel of the defendant insisted that the effect of the order, under the pleadings in the case, was to confine the account to the transactions of the partnership since the said settlement. And the master postponed the matter, to give an opportunity to take the opinion of the court upon the question.

The matter was afterwards stirred before the court ; and a motion also made for a modification of the order of reference, so as to confine it to the partnership transactions since the settlement, if the court should think a modification necessary.

Runyon and *A. Whitehead* for the defendants. They cited 15 *Wend.* 83 ; 7 *Paige*, 573 ; *Cooper's Eq. Pl.* 278.

F. B. Chetwood and *W. Pennington* for the complainant.

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THE CHANCELLOR. On a reference like this, on such a state of pleadings, the master was not at liberty to disregard the settlement. Grounds for impeaching the settled accounts should have been laid in the bill, if the complainant supposed there were any such grounds, so that the defendant could answer as to them.

If proper grounds can be laid before the court, an amendment of the bill may be allowed.

HARRIET MERSELIS vs. ISAAC H. MEAD, JOHN WARD and
CORNELIUS SCHUYLER, executors of the will of CORNELIUS
MERSELIS, deceased.

Executors, in several partial accounts which had been exhibited to the Orphans' Court, had accounted separately ; and no objection had been made to that mode of accounting, nor any effort to make the executors answerable jointly; and there was no evidence that either of the separte accountants ever agreed to become liable for what had been received by either of the others; nor evidence that the executors assumed the uncollected securities and agreed to account to the residuary legatees for the amount of them.

Held, that the executors were not jointly responsible.

Partial accounts of executors exhibited and allowed by the Orphans' Court will not prevent a person interested in the estate from bringing the executors into this court for a final settlement.

As long as the estate is not finally settled, this court may direct a statement of the whole account from the beginning, and take its own measures to compel the payment of the moneys found in the hands of the executors by such final account, notwithstanding the Orphans' Court have, on partial accounts, directed the distribution of the balances thereby found to be in the hands of the executors.

The bill, filed Feb. 23, 1846, by Harriet Merselis, states, that her father, Cornelius Merselis, made his will, dated January 16, 1835, by which, after directing his debts to be paid as soon as could be done after his decease, he gave and bequeathed to his wife, Maria Merselis, all his real and personal estate for and during her widowhood ; and also the sum of \$3,000 at her own disposal, and, in case she should die or get married without disposing of the same, he ordered his executors to divide the same among his four daughters, Sophia, Harriet, Caty, Ann, and the heirs of his deceased son Iddo, into five equal shares ; and bequeathed unto the heirs of his son Iddo, deceased, being five children, named Maria, Sophia, Cornelius, John and Highly, \$2,000 in advance out of his property ; and bequeathed to the complainant \$500 as an outfit, to be paid one year after the decease of the testator and his wife ; and bequeathed unto his four daughters, named Sophia, Harriet (the complainant), Caty and

Ann, and to his son Iddo's five children one equal share with his four daughters, making five shares, out of all the residue of his property not disposed of before. The legacies of his son Iddo's five children made to them to be paid by his executors as soon as they should arrive of full age, or whenever either of them should get married. And appointed his three son-in-laws, Isaac H. Mead, John Ward, and Cornelius Schuyler, executors of his said will. That the testator died in the fall of 1840. That the said executors proved the will on the 15th Dec. 1840.

That the executors possessed themselves of personal estate and effects of the testator to an amount greatly more than sufficient to pay the debts and specific legacies. That the said Maria, widow of the testator, surrendered and gave up her said legacy and her right to the personal estate during her widowhood, as given to her by said will, and has since died. And that the executors thereupon paid all the debts of the testator and all the specific legacies bequeathed by the said will, and received and held a large sum of money in their hands for a long space of time. And that the complainant and some of the other legatees frequently applied to the said executors and requested them to settle the said estate, and to pay to the complainant the amount of her share of the personal property in their hands; and that the complainant never could prevail on them to come to such settlement until about February term, 1845, of the Orphans' Court of Passaic. That the executors, being cited to appear in said court at that term, made their report to said court, and exceptions were duly filed to their accounts rendered, and auditors were appointed to audit their accounts, who made their report to the said court at the next term thereof.

That Sophia, mentioned in the will, is the wife of the said J. H. Mead; that Caty, mentioned in the will, is the wife of the said J. Ward; and that Ann, mentioned in the will, is the wife of the said Cornelius Schuyler.

By the report of the said auditors it appeared that the said Mead, one of the executors, had in his hands as cash collected \$3,263.66; that Ward, another of the said executors had in his hands as cash \$2,028.75; and that Schuyler had in his hands as cash \$182.32; besides divers considerable claims not then col-

lected, consisting of bonds, mortgages, notes and judgments. That at this time all the debts and specific legacies had been paid and satisfied by the executors. Whereupon the said Orphans' Court made an order for distribution of the said amount on hand, to the purport or effect following:

“In the matter of MEAD, WARD and SCHUYLER, executors, &c. Order for distribution.

It appearing to the court, upon the settlement of the separate accounts of the said executors this day, that there is in the hands of the said J. H. Mead a balance of \$3,263.66; in the hands of John Ward \$2,028.75; and in the hands of C. Schuyler \$182.32; it is ordered that the aforesaid sums be distributed and paid by the said executors to the heirs of C. Merselis, deceased, as by his will directed, viz: One-fifth to Sophia, one-fifth to Harriet, one-fifth to Caty, one-fifth to Ann, daughters of said deceased, and one-fifth to the five children of Iddo, late son of said deceased, or to their legal representatives. May 12, 1845.”

That the complainant thereupon applied to the said executors to pay to her her share of said estate as directed by the said order; and thereupon the said executors did pay to her \$135, which is all the money that has been paid to her thereon, and is the only money she has received from them or any of them since the said order.

That shortly afterwards, and on or about June 4, 1845, the said three executors and the five children of Iddo Merselis, or their legal representatives, and the complainant met together for the purpose of dividing all the bonds, mortgages, notes, &c., being the whole of the personal estate of said testator. That thereupon the said executors agreed to be charged with all the said bonds, mortgages, notes, &c., being the whole personal property of the said testator not before that time divided, except a few small claims which were left by consent of all the parties in the hands of John Hopper, Esq., with directions to divide whatever should be recovered from them in five parts according to said will. And that thereupon it was agreed upon between all the said parties, that the amount with which the said executors

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should be charged, including the said sum of \$5,471 25 as cash, was \$8,019 09, after deducting all their charges against said estate for debts, legacies, commissions and expenses, leaving for each share \$1,603 81 over and above the claims left in said Hopper's hands, as aforesaid; from which deducting the said \$135 paid to each share as aforesaid, left \$1,468 81 due to each share as aforesaid. But out of complainant's share it was agreed should be deducted a small note of \$17, and \$100 for a negro, which left \$1,351 43 due the complainant from the said executors on the 26th May, 1845.

That the said executors thereupon proceeded to settle, and pay to the five children of Iddo, or their legal representatives, the amount so fixed and agreed upon as due to them; and did thereupon settle with them and pay them the whole amount due them under said agreement. That, after the said children of Iddo had been settled with, the complainant called upon the said executors to settle with her. That thereupon the said executors adjourned, stating that they had not time to settle further on that day. That after waiting a reasonable time she notified the said executors to meet and settle her account and claim. That thereupon they met once or twice, but did not and would not settle and pay the complainant according to said agreement; and she has never been able to get payment of the sum so agreed to be due to her; and it never has been paid to her. That the complainant, when the executors were all present, stated to them that, if they had not the money to pay her, she would take a bond and mortgage on good property for the amount so due her, and give time for the payment thereof, leaving said sum at interest. That thereupon the executors, or one of them, promised to give her such bond and mortgage; but she has not been able to get such bond and mortgage, or any security for the said sum due her. The bill states, that, among other pretences, the executors pretend that inasmuch as they filed separate accounts they are not jointly responsible to the complainant, but only each for the amount so received by him, after deducting the amount due to his wife for her share of the estate: whereas the complainant charges, that the executors have jointly undertaken the said

trust, and have each received considerable sums of money and have handed over such sums to the other executor or executors ; and that the said settlement so made by the said executors with the complainant was a joint and not a several settlement ; and that they jointly and severally agreed to pay her the said amount so agreed to be due her, with legal interest on the same from said May 26, 1845 ; and that as such executors they had no right to retain in their hands the amount so due to their respective wives and leave the complainant unpaid.

The bill prays, that the executors may be decreed to pay the complainant the said sum of \$1,351.43, with interest from May 26, 1845, out of their own estate ; and that, if it shall appear that no such agreement and account has been made and taken, or that for any reason they shall not be held liable according to such accounting, then that they pay her the amount so ordered by the said Orphans' Court to be paid to her, with interest thereon ; and that they account to her for the residue of the personal estate of said testator which was not embraced and included in the account taken by the said auditors on which the said order of distribution was made ; and that they account for the amount so found due to the complainant ; and be decreed to pay to her the amount which on such accounting shall be found due to her ; and for such other and further relief, &c. And she tenders herself ready to give a refunding bond.

The executors answered separately.

John Ward, in his answer, after admitting the wil^l and probate as stated in the bill, denies that he and the other executors jointly possessed themselves of the personal estate to a large amount, and jointly undertook to perform the duties of executors, and jointly proceeded to dispose of the property and collect the debts, and out of the moneys jointly to pay legacies and debts of the testator ; or that he managed any assets, or paid any legacies, except as in his answer after set forth. He says that, some time before the death of testator, the defendant Mead had become the general agent of the testator, with the approbation of the complainant, and had managed his affairs for him, and had

thus become much better acquainted with the situation of his property and the character and condition of the debts due to him than either of the other executors. That as said Mead was more conversant with the business of the testator than either of the other executors, though they all proved the will, yet it was understood between them, with the concurrence of the complainant, that the execution of the will should principally devolve on said Mead ; and Mead, thereupon, from the beginning took the burthen thereof mainly upon himself, and possessed himself of a large bulk of the estate, and collected debts, and has paid large sums of money on account of the estate in debts and legacies.

He admits that all the executors were cited to render their acceptances before the Orphans' Court of Passaic, in October term, 1844, and that they exhibited their accounts before said court ; but he says that each executor accounted separately for the amounts he had received and expended ; but he denies that he ever refused to come to an account of the moneys which had come to his hands ; or that those were the first accounts rendered by the executors. He says that on the 4th October, 1843, each of the executors rendered a separate account, which was filed with the surrogate, to which no exceptions were then taken ; and that each of the accounts afterwards rendered under said citation commenced from the foot of each accountant's previous account.

He admits that exceptions were subsequently filed to all the accounts by and in behalf of the children of Iddo Merselis ; but says that no exception was made on the ground that the executors had accounted separately ; nor was there any pretense made before the Orphans' Court, or before the auditors who re-stated those accounts, that the executors, or any two of them should be jointly chargeable for the whole estate ; or that any one of them should be charged for more than had actually come to his hands. He admits that the said accounts and exceptions were referred to auditors ; and says that the auditors examined both sets of the accounts, and re-stated the same separately for each executor, and reported them thus re-stated to the Orphans' Court for approval ; and that the said court on the 12th May, 1845, approved

the separate accounts as re-stated, and decreed that the same should be allowed.

He says that in those accounts Mead was charged with the whole inventory, and was credited with such items thereof as had come through his hands into the possession of this defendant, and this defendant was charged therewith.

He denies that he has possession or intermeddled with any part of the estate except as appears in his said accounts as re-stated by the auditors; or that he has received sums of money belonging to the estate and handed them over to either of the other executors; or that he has in any way intermingled his accounts with those of either of the other executors; or that he has in any way made himself liable for the moneys and assets of the estate which have passed into the possession of the other executors or either of them; and insists that he is accountable only for the balance reported against him by the auditors.

He admits that the Auditors reported a balance in Mead's hands of \$3263,66 after deducting his commissions; and a balance in the hands of this defendant of \$2020,75 after deducting his commissions; and a balance in Schuyler's hands of \$182,32 after deducting his commissions; and admits that Mead was credited in his accounts with various assets that had been charged in the inventory and which, at the said time of accounting remained uncollected; and that the amount to be distributed under the will will be increased, over the above stated balances, by the amounts which have been and may be collected from those assets; but he says that many of those claims are doubtful and many others of them worthless.

He admits that the Orphans' Court, on the same day on which they decreed the allowance of the separate accounts of the executors as aforesaid, after reciting the balance in hands of each executor, also ordered that the said sums be distributed and paid as by the said will is directed.

He says that he cannot with certainty answer how much the complainant has received out of the estate since the said order of distribution was made; but he denies that he has paid her anything, or contributed anything towards any payments which she may have received from either of the other executors.

He admits that after the said order of distribution was made, and at the time for that purpose stated in the bill, all the parties interested in the estate went together and examined into the nature and character of the bonds and other assets and securities that had been credited in the account of Mead remaining uncollected and lying in the hands of J. Hopper, Esq., for the purpose of determining on the best disposition to be made of them ; but he denies that he then or at any other time agreed to be charged, either separately, or jointly with his co-executors, or either of them, with the said bonds, mortgages or other securities, or with any of them, or any part thereof ; or that he assumed any liability on account of the same, or agreed that the balance reported against him by the auditors should in any wise be increased by those assets or in any other manner ; or that he would be liable for or pay over to any of the parties interested any more money than the surplus of the amounts so decreed against him after deducting therefrom the distributive share coming to his wife Caty. He denies that any such account as charged in the bill was stated between the executors on the one part and the complainant or any other person or persons on the other ; or that the executors agreed to be charged with the sum of \$8019,09, or with any sum of money other than as they are charged in the accounts as they passed the Orphans' court ; or that any settlement was made between the executors and the complainant showing that there was a balance of \$1468,81 coming to the complainant for her distributive share ; or that after deducting certain amounts from it there would be due the complainant \$1351,43 from the executors on the 26 May, 1845 ; or that he either separately or jointly with the other executors or either of them, promised to pay the complainant any sum of money, or promised to give her a bond and mortgage, or any other security ; or that he has done any act or entered into any engagement that can make him liable to pay the amount claimed by the complainant, or to respond jointly with the other defendants, or either of them, for the moneys and assets of the estate which have fallen into their or either of their hands ; or that he can be compelled to assume the payment of any of the bonds, &c. which are still uncollected.

He says that, the representatives of Iddo Merselis, legatees named in the will, being minor children, and on account of their situation, in his opinion entitled to priority in payment, he, about June 4, 1845, paid to them and those representing them \$1488 75, out of the balance reported by the auditors as aforesaid to be in his hands; thereby leaving in his hands only \$560 on account of the distributive share coming to his wife; but he denies that such payment was made on the basis of any settlement between the executors and the legatees or persons interested in the residue of the estate, or upon any assumption on his part of the uncollected assets, or of any liability on account of moneys in the hands of either of the other executors; but that the said advance was made by him because he thought he would be better able than the said children could be to reimburse himself out of the uncollected assets.

He says that he became a purchaser of some of the personal estate of the testator, to the amount of \$22 17, with which amount he has been charged in his said account. That a part of the inventory consisted of two judgments obtained by the testator against one John Marinus, which, with interest amounted to \$1458 15; that the collection of those judgments was passed over by Mead to this defendant, and Mead was credited therewith in his account and this defendant was charged with them. That, considering the claim to be quite doubtful, this defendant negotiated with Marinus for further security; and, upon payment of the further sum of \$461, he obtained, for the benefit of the estate, the assignment of a bond and mortgage of one Jarvis Grennel for the payment of \$1850, or thereabouts, which is duly charged against him in his accounts. That he gave his individual note for the said \$461, payable some time after date; and having no moneys of the estate in his hands, he applied to Mead and received from him the said \$461, with which he paid his note; with which sum this defendant is charged and said Mead is credited in the aforesaid accounts.

He denies that he has received any other assets or moneys of the estate from Mead or Schuyler.

He admits that he afterwards received on two occasions, from the owner of the equity of redemption of the premises

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mortgaged to secure the payment of the said Grennel bond \$111 of interest on said bond and mortgage ; and that he has received payment of \$28 20 from one Walker, the amount of a judgment recovered by the testator against him and not inventoried ; and that he has twice received the rent of a house in Paterson belonging to the estate, which had been in his charge during the life of the testator, amounting together to \$101 ; which said sums are charged against him in his aforesaid accounts ; and he says that he has not received any other moneys belonging to the estate, nor taken charge of any other property or effects of the estate, nor intermeddled with any of the claims that remained uncollected at the time the accounts of the executors were rendered as aforesaid. He denies that he has been unwilling to have the accounts of the estate settled and closed ; or that he has deferred the same for want of time, or in any way delayed the same ; but says that he has always been desirous that the legatees and persons interested should receive the moneys due them, respectively, and that for that purpose, after the said decree for distribution was made, he offered to his co-executors that, if they would assign to him individually a bond and mortgage belonging to the estate and remaining uncollected, given by one Hiram Gelal, for \$1,000, and interest, he would advance the amount due on the same, first deducting the balance due to his wife over and above the amount in his hands, that the same might be divided among the others according to the will ; and that Mead was willing to accept the proposal, but that Schuyler objected to it and refused to execute or to sanction such proposed assumption.

He submits that he is not bound to pay over to the complainant or to any other person, the amount in his hands to which his wife is entitled, it being less than her distributive share ; but that he has a right to retain the same towards the payment of her share and that the complainant and others interested in the distribution of the estate must look to Mead for the payment of the moneys reported by the auditors to be in his hands ; and that the effort on the part of the complainant to charge the executors jointly, and to make this defendant personally liable for more moneys and assets than have come to his hands is unjust.

Mead, in his answer, admits that the executors, or some of them took possession of all the personal effects and estate, as executors, and that the said estate and effects were more than sufficient to pay the debts and specific legacies ; and that the executors collected divers sums of money ; and that the widow surrendered and gave up the legacy bequeathed to her and also her right to the personal estate during her widowhood, except a certain portion of said personal estate, amounting in value to \$903.26, which was taken by her for the use of the family ; and that she has since died ; and that, so far as he is informed and believes, all the specific legacies have been paid ; but that certain debts, amounting in all to about \$380, remain unpaid.

He says that considerable sums of money have come to the hands of these executors from time to time ; but that such sums as came to his hands have been from time to time appropriated to the payment of debts or legacies, without being retained in his hands an unreasonable time.

He admits that all the executors, not having settled the estate, were cited before the Orphans' Court, and that they rendered separate accounts ; and that exceptions were filed and auditors appointed to audit as well the separate accounts as all other accounts theretofore filed by the executors. And that the auditors examined said accounts, and reported to the Orphans' Court. But he denies that by the said report it appears that he had, at the date of said report, in his hands as cash, \$3,263.66, though he admits and states, that the said sum is the balance appearing against him by said report ; but that therein a large amount of bonds, notes, book accounts and judgments are charged against him, some of which have never been collected ; and the whole inventory is therein charged against him ; on the sale of which personal property certain losses have unavoidably occurred which are not therein allowed to him ; and that, in and by the said report, the moneys stated to have been actually received by him compose a small proportion of the whole amount charged against him ; and that said bonds, notes, book accounts, judgments and personal property are a part of the account on which said balance is struck ; and he prays leave to refer to the said report.

He admits the order of distribution stated in the bill; but avers that it is erroneous and unlawful, and ought not to be enforced in equity, in that it directs the distribution of moneys which had not then and have not since come to his hands, and which were not then and are not now chargeable to him, and in that the same is not in accordance with the said auditors' report on which it is manifestly based.

He says he has heard and believes that, shortly after the date of the said order of distribution, \$135 was paid to the complainant; but that he has no knowledge by whom it was paid, though he believes it was by his co-executor Ward; but whether paid in pursuance of said order of distribution he has no knowledge. He admits he has met together with his co-executors and the children of Iddo Merselis, or their representatives, for the purpose of settling said estate, about June 4, 1845; but he denies that at said meeting, or at any other time, he, as one of the executors, either severally or jointly with them, agreed to be charged with all the bonds, mortgages and notes not before that time divided, being the whole of the personal estate of the testator not before then divided, except as in the bill excepted; and that he did not at said meeting, or at any other time, either severally or jointly with his co-executors and the said devisees, agree that the said executors should be charged with \$8,019.09 after deducting all their charges against said estate for debts, legacies, commissions and expenses and including the said sum of \$5,471.25 as cash. On the contrary, he avers that he did not then, nor has he at any time made any agreement with the parties aforesaid, or with any other person or persons, that could bind him to pay and made good out of his individual estate any losses that might be incurred on any of the said bonds, mortgages, notes, judgments or accounts, or to pay any debts that might still remain due from said estate, or to release or abandon any just and lawful claim he then had or might thereafter have against said estate for or on any account whatever. He denies that \$1,341.43, or any other definite sum, has been agreed upon by him as a fixed balance due the complainant; and avers that the pretended facts stated in the bill, and which are the basis of the calculation which results in the said balance, are

(as they have been hereinbefore) denied ; and that the complainant has no claim except for one-fifth of such residue as may remain after all the residue of said estate shall be converted into money and all debts, costs, expenses and liabilities shall be paid and discharged.

He admits that, since the date of the said decree of the Orphans' Court, \$1,300, as near as he can recollect the amount, has been paid or secured to the children of Iddo Merselis ; but he denies that by the said payment any agreement was recognized by which the defendants, or any or either of them, was bound to answer for any part of the assets of the estate out of their own personal property, or by which any bonds, judgments, notes or accounts then remaining uncollected should be charged to the defendants, or either of them, as cash, or by which any certain or fixed sum was ascertained as the amount due the complainant as residuary legatee ; and avers that the said payment or security for payment was made and given in good faith, and under the belief that the same would not exceed the amount that would fall to the share of the said minor children on the final settlement of the said estate ; and further, that such payment and security were made and given with the knowledge and concurrence of the complainant.

He admits that, after said payment or security to Iddo's children, the complainant called on these defendants to settle with her for her share, and that the said claim as stated in the complainant's bill has not been paid, to the best of this defendant's knowledge and belief ; and as to the allegations of the complainant respecting an offer made by her to take a bond and mortgage on good property for the amount in her bill alleged to be due to her, as said offer is stated in said bill, he says he has no knowledge of any promise by the executors, or either of them, to give the complainant such bond and mortgage ; though he admits that, about the time in the bill stated as the time of said offer and promise, the complainant offered to take a mortgage on certain property of this defendant, by her designated, for an amount which this defendant does not recollect, but exceeding the amount by her claimed in her bill, and comprising as well a claim made by her under the pretended agreement in her bill set forth

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as certain other pretended claims made by her against this defendant individually and not as executor; but that this defendant refused to comply with said offer, and offered, on his part, to secure to her by mortgage an amount which he cannot now recollect, but less than the sum then claimed by then complainant, and less than the amount claimed by her in her bill; but that the complainant refused to accept his said offer, and neither party was bound to abide by the offers then made, no agreement having been concluded between them.

He admits that Sophia is his wife; and that Caty is the wife of Ward; and that Ann is the wife of Schuyler.

The defendant Schuyler, in his answer, denies that he took into his possession any of the personal estate; and says that Ward and Mead took into their possession all the personal estate, and the whole burden of the settlement of the estate.

He admits the citation of the executors before the Orphans' Court, and the proceedings thereon as stated in the bill; and says that, though he was charged in the report of the auditors and in the decree with \$182,32 as cash, to which he did not object, yet that this sum was the amount of a bill of articles bought by him at the vendue, and which was left unpaid by him to be deducted from his wife's distributive share. He says that, on or about June 4, 1845, Mead, Ward and himself and the five children of Iddo, or their representatives, and the complainant met together for the purpose of dividing all the bonds, mortgages, notes, &c., being the whole of the personal estate, and settling the estate. That thereupon an account was made out of the whole estate, except a few claims which, by consent of all parties, were to be left in the hands of John Hopper with directions to divide whatever should be recovered from them in five parts according to the will; and that on such accounting this defendant was to be charged with the said \$182,32, being the amount charged against him, on account of his wife's share; and that the whole of the personal estate, except the amount so left in Hopper's hands, after deducting all charges against said estate for debts, legacies, commissions and expenses, was \$8,019.09, leaving for each share \$1,603.81 over and

above the amount in Hopper's hands. But, inasmuch as this defendant had not in his possession any of the moneys of the estate, the persons entitled to distributive shares were to be paid by Mead and Ward, they having the whole estate in their hands.

That upon making this statement, and all parties agreeing to it, Mead and Ward thereupon forthwith proceeded to settle with Iddo's children, or their representatives, and paid them their share of the estate, being the amount so fixed upon and agreed to as their share.

That, after Iddo's children had been settled with, the complainant demanded that she should be paid; but that they then adjourned; and that afterwards they had another meeting, all being present except Iddo's children and their representatives; and this defendant believes that the complainant has never been paid the amount due her for her share; but he insists that, as he never had the estate in his hands, he ought not to be charged therewith, but that the same ought to be paid by Mead and Ward, who held all the moneys and assets in their hands.

Testimony was taken; and the cause was heard on the pleadings and proofs.

A. S. Pennington for the complainant.

John Hopper for the defendant Ward.

D. Barkalow for the defendant Mead. He cited 1 *Green's Ch.* 490; 2 *Id.* 44, 54, 231.

THE CHANCELLOR. That part of the prayer of the bill which is founded on an alleged agreement by the executors to become jointly responsible to the complainant for a certain amount, including several bonds and mortgages and other securities not yet collected, and which prays that the executors jointly may be decreed to pay to the complainant that certain amount, cannot, upon the proofs in the case, be granted. The executors, in the several partial accounts which had been exhibited to the Orphans' Court

and allowed, had accounted separately; and no objection was made to that mode of accounting, nor any effort to make the executors answerable jointly; and there is no evidence to show that either of the separate accountants ever agreed to become liable for what had been received by either of the others; nor any evidence sufficient to show that the executors assumed the uncollected securities and agreed to account to the residuary legatees for the amount of them.

By the last separate accounts of the executors settled before the Orphans' Court there was found to be in the hands of the executor Mead, \$——; and in the hands of the executor Ward, \$——; and in the hands of the executor Schuyler, \$——; and by the order of that court the executors were ordered to distribute the amounts in their hands.

Another part of the prayer of the bill is, that if the executors cannot be held liable on the agreement set out in the bill, (the alleged agreement on which the first part of the prayer is founded) then that the executors may be decreed to pay to the complainant the amount so ordered by the Orphans' Court to be paid to her, with interest thereon, and that they account for the residue of the personal estate which was not included in the accounts allowed by the Orphans' Court; and that they may be decreed to pay to the complainant the amount which on such accounting shall be found due to her; and for such further and other relief, &c.

No final account has ever been settled by the executors in the Orphans' Court. The partial accounts which have been exhibited to and allowed by the Orphans' Court cannot prevent the complainant's bringing the executors into this court for a final settlement.

This is as far as it is necessary to go at present. It will be referred to a Master to take and state the accounts of the executors; and all further equity and directions are reserved until the coming in of the Master's report. It was argued on the part of the defendant Mead, that, inasmuch as the Orphans' Court had made an order for the distribution of the several amounts found in the hands of the respective executors by the partial accounts exhibited to and allowed by the

Orphans' Court, the complainant could ask no relief in this court in reference to those amounts ; for that the power of the Orphans' Court to compel the distribution was ample.

The question here presented is, whether, when on partial settlements by executors the Orphans' Court order distribution of the moneys then in hand, and they are not distributed, and the complainant comes into this court for a final settlement, and the estate is finally settled here, this court cannot act in reference to the balances struck against the executors by the Orphans' Court on the partial settlements, and adopt its own measures to compel their payment.

It seems to me that, as long as the estate is not finally settled, this court may direct a statement of the whole account from the beginning, and take its own measures to compel the payment of the moneys found in the hands of the executors by such account, notwithstanding the Orphans' Court have, on partial accounts, directed the distribution of the balances thereby found to be in the hands of the executors.

It will be referred to a Master to take and state the accounts of the executors ; and all further equity and directions are reserved until the coming in of the Master's report.

Order accordingly.

RANDOLPH FIELD and HENRY SHEPHERD *vs.* JONATHAN CORY
and ——— WALDRON, Overseers of the Poor.

On the oath of E. G., a single woman, that R. F. had gotten her with child, and that the child was likely to be born a bastard and to be chargeable to the township of Warren, in the county of Somerset, a warrant was issued by P. M. and L. M., two of the Justices of the Peace of the said county, for the arrest of R. F., and a summons for the appearance of the said R. F. and E. G. before the said two Justices. By virtue of this warrant, a constable of the said county arrested R. F. and took him before G. W., another Justice of the Peace of the said county. R. F. denied the charge, and proffered himself ready, with H. S., his friend, to give the requisite security for his appearance at the General Quarter Sessions of the Peace, to abide such order, &c. Instead of taking a recognizance for appearance as aforesaid, the said Justice G. W., prepared a bond to indemnify the township, which R. F., with H. S. as his surety, executed, supposing it to be an instrument of security for appearance as aforesaid. Afterwards, an examination was had before the said P. M. and L. M., Justices, the Overseers of the Poor of the said township attending, and the Justices decided against making an order of bastardy against R. F. Afterwards, one of the said Overseers informed R. F. that the instrument which he and his said surety had signed, as aforesaid, was a bond to indemnify the township; and that the Overseers intended to enforce it. R. F., thereupon, went to Justice G. W., to inquire, &c., who informed R. F. that he, the said Justice, knew it was the intention of R. F. and his said surety to give security for the appearance of R. F. as aforesaid; but that the constable told him, the said Justice, that he must prepare an indemnifying bond; and he did so; but that, as he had made the mistake, he would make out a recognizance for R. F.'s appearance as aforesaid. And the said Justice made out the recognizance, and sent it to the Court of Quarter Sessions; which court, at the next term thereof, discharged R. F. and his surety therefrom. And, afterwards, the said Overseers commenced an action in the Circuit Court of Somerset on the said bond of indemnity.

On a bill stating the foregoing facts, an injunction was allowed restraining further proceedings in the said action.

The bill prayed a decree that the said bond be delivered up to be cancelled. No answer was put in. An order for proofs was made; and, subsequently, a decree for the complainants.

On the 17th June, 1846, Randolph Field and Henry Shepherd exhibited their bill, stating, that Elizabeth Giddis, a single woman, on the 4th August, 1845, appeared before Peter Moore, a Justice of the Peace for the county of Somerset, and made oath charging the complainant Field with getting her with child, and

that the child was likely to be born a bastard and chargeable to the township of Warren, in the said county. That on the 10th Dec. 1845, the said Peter Moore and Lewis Mundy, two of the justices of the peace of the said county, issued a warrant for the arrest of Field, and a summons for the appearance of Field and the said Elizabeth before them. That on the 16th Dec. 1845, David Bird, one of the constables of said county, by virtue of the said warrant, arrested Field and carried him before Garret N. Williamson, Esq., a justice of the peace of said county. That Field, being innocent of said charge, and being persuaded that on a fair trial he could prove himself to be so, in order that a trial might be had, called on the complainant Shepherd to be his surety for the appearance, and for the appearance only, of Field, that the trial might be had according to law, on the day mentioned in the said summons. That the complainants, being farmers and entirely ignorant of proceedings at law in such cases, and being far from counsel, and Field being in custody of the constable as aforesaid, relied upon the said Justice Williamson to prepare such a paper, and such a paper only, as would secure the appearance of Field. That on the day last aforesaid the said Justice Williamson prepared a paper writing, as the complainants supposed and believed, according to the request of the complainants, to which the complainants put their names, supposing and believing it to be a security for the appearance of Field, at the next Court of General Quarter Sessions of Somerset, to abide and perform such order or orders as should be made in pursuance of the statute in such case made and provided.

That the overseers of the poor of Warren had full notice, on the day last aforesaid, that the complainant Field denied being the father of the child, and of his intention to contest the said charge; and that the said overseers, as well as the said Field, prepared themselves to try the said question of bastardy. That on the 17th Dec. 1845, as well the said overseers, with their counsel, as the said Field with his counsel, appeared, prepared to try the said question of bastardy.

That the said question was, on the day last aforesaid, tried before the said justices, and a judgment of acquittal pro-

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nounced in favor of Field. A copy of the proceedings before the justices is given, as follows :

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August the 4th, 1845. Personally appeared before me the subscriber, one of the Justices of the Peace in and for the county of Somerset, Elizabeth Giddis, of, &c, and made affidavit before me charging therein Randolph Field with getting her with child. I received a line from Daniel Waldron, overseer of Warren, requesting me to issue a warrant for the arrest of the said Randolph Field ; which I immediately done. December 10, 1845, I, together with Lewis Mundy, issued a summons for the appearance of the said Randolph Field and the said Elizabeth Giddis. December 17th, David Bird, constable, returned the warrant indorsed by G. S. Williamson, justice, certifying that the parties or defendant had entered in a bond to indemnify the township of Warren. David Bird, constable, also returned the summons, having served the same on the defendant by leaving him a copy of the same. 17th, the parties appeared, and proceeded to trial. For the plaintiff were sworn and examined Elizabeth Giddis, and Fanny Giddis. For the defendant were sworn Richard Field, Catharine Field, Hannah Randolph, Agnes Jackson, Hannah Perrine, Maria Vanderwater. After hearing the evidence of both parties, the court agreed not to make an order of bastardy against the defendant. I do hereby certify that the foregoing is a true copy of the record. Given under my hand and seal January 1, 1846.

PETER MOORE, [L. s.]

Justice of the Peace.

The bill states that after the said trial, and after the said justices had pronounced their judgment, and on the same day, Jonathan Cory, one of the overseers of the poor of Warren, informed Field that these complainants had entered into a bond indemnifying the said Township against the maintenance of the said bastard child ; and that the said overseers intended to enforce the said bond. That Field, well knowing that he never intended to give such a bond, demanded of the said overseer to

produce said bond ; to which demand the said overseer gave an evasive answer. That Field then demanded of the said overseer that he should deliver up the said bond to be cancelled, inasmuch as it never was his intention to indemnify the township, or to give a bond for that purpose, but, on the contrary, only to give such security as would secure his appearance to try the said cause before the said justices. That the said overseer refused to deliver up the said bond, and threatened to proceed at law to enforce the same ; the complainants being well convinced that, if they had given such a bond, it was done through a mistake of their rights or intentions. That Field immediately repaired to the said G. S. Williamson, Esq., and inquired of him how it came that he had induced the complainants to sign a bond to indemnify the township against the maintenance of the said bastard child, instead of taking security for the appearance of Field. That said Williamson replied, that he understood from the complainants that it was their intention to give security for the appearance of Field ; but that the constable who had Field in custody informed him, the said Williamson, that he must prepare an indemnifying bond ; and that he, the said Williamson, through misapprehension of the real design of the complainants, prepared the bond accordingly ; but, inasmuch as he, the said Williamson, had made the mistake, he would make out the recognizance and send it to the Court of General Quarter Sessions, according to law. That said Williamson did make out a recognizance and send it to the said court in the words and figures following, to wit : (it is given): it is a recognizance purporting to have been taken by G. S. Williamson, a Justice, &c., by which Field and Shepherd acknowledge themselves indebted to the State in \$200 each, to be levied, &c., and reciting the charge, and conditioned for the appearance of Field at the next Court of Quarter Sessions for Somerset, to abide such order or orders as shall be made in pursuance of the act entitled "An act for the maintenance of bastard children." The bill states, that such proceedings were had upon the said complaint, that the said Court of Quarter Sessions, in the term of February, 1846, discharged the complainants, Field and Shepherd, from their said recognizance. That the

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said overseers of Warren well knew that the said bond was given by the complainants through mistake and contrary to their intentions; yet that Cory and Waldron (the defendants), the overseers of the poor of Warren, have commenced an action in the Circuit Court of Somerset to enforce the said bond.

The bill prays that the said bond may be decreed to be delivered up to be canceled; and that, in the meantime, the said suit may be enjoined.

The injunction was granted.

No answer was put in; and an order for proofs was made.

Wm. Thompson for the complainants.

THE CHANCELLOR. Decree for complainants.

HEZEKIAH KELLY vs. THE NESHANIC MINING COMPANY.

A judgment which was not entered until after the appointment of a Receiver under the "Act to prevent frauds by incorporated companies" is not entitled to preference.

Semhle, that a judgment which was not entered until after injunction granted under the said act is not entitled to preference.

Semhle, that the Receiver, under the said act should sell the property, irrespective of the incumbrances, and pay the incumbrances; according to their priority, out of the proceeds. But that the court may direct the Receiver to sell subject to the incumbrances.

Asto the question whether the Receiver should sell the engine, mining tools and implements with the mine lands or separately, the court left it to the discretion of the Receiver, to be determined by inquiries to be made by him as to the probability of finding ore by continuing the works; no ore having yet been found.

On the 12th November, 1847, Hezekiah Kelly filed a bill, under the act relating to insolvent corporations, against the Neshanic Mining Company.

The bill charges, that the said Company have suspended their ordinary business, from November 9th, 1847, (having before charged that the company ceased paying, &c., from August 2d preceding): and that the company, as the complainant has heard and believes, are insolvent.

That the company, on the 13th of May, 1847, employed the complainant as a superintendent, at the rate of \$1,500 per annum, which sum, with traveling expenses, the company agreed to pay monthly.

That the company have not paid him monthly; but that they are indebted to him in \$600 for his services and traveling expenses.

That the Company are indebted to him in the further sum of \$400, paid, laid out and expended for the use of the company, at their request, in the purchase of tools and the payment of laborers; which said sums were paid and advanced by the complainant from September 1, to November 8, 1847.

The bill states that the Company are indebted to divers

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persons (naming them,) in divers sums, amounting in all to \$4,494.43, including a debt stated to be due to Jacob Rockafellow of \$2,118.97.

That J. H. Bill pretends that he has a claim against the Company, for money advanced and services rendered, of \$500.

That the value of the real estate of the Company is \$3,000; the value of the engine and machinery \$750; the value of the pump, tools, &c., \$160; which is all the property and assets of the Company, as far as the complainant knows and believes, amounting to \$3,910.

The bill prays a discovery of the property of the company; and that the complainant and the other creditors and stockholders of the company who may come in may be paid; and that the company be enjoined from receiving debts and from transferring debts or property, and from exercising their franchises; and that a receiver be appointed.

The injunction prayed was allowed. On the 22d March, 1848, a demurrer was filed to the bill by the company.

On the same day, Janet Blair filed a bill against the company for the foreclosure of two mortgages on their real estate; one dated April 20, 1847, given by Anthony Dey to the said Janet Blair, to secure the payment of a bond, of the same date, given by Dey to her, conditioned for the payment of \$500 on or before the 1st of July then next, with interest from and after the 1st of May then next; which mortgage is stated to have been acknowledged on the 3d June, 1847, and to have been recorded June 15, 1847; the other mortgage dated the same 20th of April, 1847, given by Anthony Dey to the said Janet Blair to secure the payment of a bond, of the same date, given by Dey to her, conditioned for the payment of \$2,000 on or before the 1st of May, 1848, with interest from the 1st of May, 1847; which last mentioned mortgage is stated to have been acknowledged on the 24th of April, 1847, and to have been recorded on the 28th of that month. This bill states, that the said complainant, Janet Blair, has been informed that, previous to the execution and delivery of the said two mortgages, the said Dey had executed a mortgage on the same lands to Jacob Rockafellow, for \$2,000, dated during or about some day in April, 1847; and the said Janet admits that,

if the said mortgage is any lien, it is a lien prior to her said mortgages. But this bill says that the whole sum due Rockafellow on his said mortgage was \$2,006.67 on the 19th May, 1847, when that amount was lawfully tendered to the said Rockafellow, in specie, in payment of his said bond and mortgage. That after the execution and delivery of the before mentioned mortgages the said premises were conveyed to the Neshanic Mining Company by said Dey and his wife.

This bill states, that the said premises are in such a condition that they cannot be divided without materially injuring their value and jeopardizing the securities thereon; and prays that the whole premises may be sold.

Subpœna is prayed against Rockafellow, Dey, and the Neshanic Mining Company.

On the 25th May, 1848, the petition of John G. & Joseph H. Reading, Jacob Rockafellow, and five others therein named was presented, stating the filing of the bill of Hezekiah Kelly; that the Company are indebted to the petitioners as follows: To the said Readings, they being partners, in \$206.92; to Stinemire & Schamp, in \$21.92; to Jacob Rockafellow, in \$45.63, besides the amount due on his mortgage for \$2,000; to Charles Green, in \$90.75; to John Rockafellow, in \$44.25, and to Thomas Gray, in \$34.49; these being the petitioners named in the petition. The petitioners pray to be permitted to come in under the bill filed by Kelly. The petition states that the said Company suspended their ordinary business on the 9th of November, 1847, and that their business had since remained and still was so suspended and stopped; and that the machinery and tools of said Company are rapidly becoming spoiled for want of any care and attention.

That since the argument of the motion for the appointment of a receiver on the 27th November, 1847, and on the 22d May, 1848, Janet Blair has filed a bill, setting forth, &c., (stating the contents, or part thereof.) That since the argument of said motion and since the service of the injunction on the Company, and notwithstanding, a writ has been issued out of the Supreme Court wherein one Marmaduke Moore was plaintiff, against the said Company, in trespass on the case, returnable the first Tuesday in

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January, 1848, returned with the following indorsement thereon: "Appearance is signed for the defendants by order of the Company by Wm. Pennington, Attorney of Company." And that, by the consent of the said defendants, and by their confession, judgment was entered against them in said suit on the 5th April, 1848, and the damages assessed by the court at \$1,090.50 besides costs; for which sum judgment was entered against the said defendant, in favor of said Moore, by virtue of the following confession of judgment on the bottom of the said assessment: "The above are agreed to as the amount of damages in this cause; by order of the defendants, Wm. Pennington, Attorney for defendants, April 4th, 1848." Said assessment setting out the claim to be for cash advanced by the said Moore to the said Company on the 29th October, 1847, together with the interest thereon; the said Moore making no affidavit that the same was justly due him, nor any other person making such affidavit for him. The petitioners say they are informed and believe that the declaration in the said cause was not brought to the office of the clerk of the Supreme Court until after the 3d Tuesday in March, 1840; but that the same is marked filed as of the proper time for filing the same, by collusion and consent, as the petitioners believe, of the said defendants in said suit. That execution has been issued on the said judgment, to the sheriff of Hunterdon, commanding him to make the amount of said judgment out of the property of the said complainant.

The petitioners state, that neither the said mortgage for \$2,000 to Janet Blair mentioned in the said bill, nor the said claim of Marmaduke Moore for cash advanced, was mentioned or inserted in the schedule made by J. H. Bill, marked exhibit A. in this cause, of the liabilities and assets of said company; nor are they mentioned or included in the affidavits of said J. H. Bill made in this cause, though in one of said affidavits he declares that his position in the company has enabled him to understand with accuracy its financial condition and the state of its accounts with individuals. Neither has said Dey, in his affidavit concerning the affairs of the company, mentioned either the said \$2000. mortgage to Janet Blair or the claim of Marmaduke Moore for cash advanced; but the said J. H. Bill has mentioned in his schedule

the mortgage of \$500 to Janet Blair; all which affidavits were read before the court on the argument of the motion aforesaid for a receiver.

The petition prays an injunction restraining the sheriff of Hunterdon from selling the property of the said company by virtue of the said execution in favor of said Moore, and from all other proceedings thereon, until the further order of the court; and that a receiver be appointed to receive and take charge of all moneys, goods and lands of the said Neshanic Mining Company, for the benefit of the creditors and stockholders of the said company.

The petition was subscribed and sworn to by J. H. Reading, Benjamin Stinemire, Jacob Rockafellow, Charles Green, John Rockafellow and Thomas Gray.

The injunction prayed in this petition was allowed, and a receiver appointed, on the 23d May, 1848.

On the 6th June, 1848, a supplemental bill was filed by Hezekiah Kelly and the said petitioners against the said company and Janet Blair, Marmaduke Moore, and Joseph H. Bill, stating the original bill filed by Kelly, and the filing of the said petition; that an injunction issued on the said bill of said Kelly; that an injunction issued on the filing of the said petition, pursuant to the prayer thereof; and stating the appointment of a receiver. (Amplius B. Chamberlain.) And showing, by way of supplement, that since the filing of the original bill by Kelly, Janet Blair had filed her bill, (setting forth the contents thereof). That the complainants have been informed, believe and expressly charge, that the whole price or consideration paid or agreed to be paid by Dey for the premises was \$4000; \$2000 of which he paid in cash, and executed to Jacob Rockafellow, of whom he purchased the premises, a mortgage on the said premises, dated April 20, 1847, recorded April 27, 1847, to secure the payment of the remaining \$2000. That at the time or before the conveyance of said premises by Dey to the Neshanic Mining Company, Janet Blair was paid the sum of \$1500 and received and took a mortgage of \$500 on the said premises, in full satisfaction of her said mortgage for \$2000. That said Dey, in his deed of the premises to the Neshanic Mining Company, recorded &c., has

fully set out all the incumbrances upon the said premises which remained due and unpaid at the time of the making of said deed, and has therein stipulated for the payment of the same by the said company; which stipulation the said company have thereon agreed to, and in testimony thereof, have thereto affixed the common seal of the said company; and the signature of Isaac A. Johnson, the president of the said company, is thereto subscribed. But that the said mortgage to Janet Blair for \$2000 is not therein mentioned or referred to, because it had been fully paid and satisfied in manner aforesaid.

This bill charges that the mortgage to Janet Blair for \$500 was not executed and given on the 20th of April, 1847 but that the same was not executed and given before May 30, 1847.

He states the judgment of Moore against the company, entered on the 5th of April, 1848, for \$1090 50, besides costs, and that an execution issued thereon to the sheriff of Hunterdon; and charges that it was obtained by the collusion and consent of the company, notwithstanding the injunction restraining the company from incumbering or otherwise disposing of any of the real estate of the company; stating the facts stated in the said petition in relation to the said judgment. It there charges that no money was advanced by Moore to the said company on the 29th October nor at any other time; and that the said judgment is fraudulent, and was obtained by the collusion and consent of the said company to avoid the injunction issued by the court, and to incumber the property of the said company, and to prevent the complainants from obtaining the moneys due them from the said company, and to cover and fraudulently protect the property of the said company from their creditors; the company having suspended, &c., on the 9th of November, 1847, and having remained so suspended, and no money having been laid out and expended by them since that time.

That the defendants produced and offered as evidence in this cause the affidavit of J. H. Bill, with a schedule therewith of the liabilities and assets of the said company, which is marked exhibit A. in this cause, dated November 27, 1847, in which the said bill declares, &c. (as before stated). That the said schedule and affidavit do not include or mention the mortgage for \$2000

pretended by Janet Blair to be still existing, nor the said judgment obtained by Moore, nor any sum as being due to him ; nor is his name mentioned in said schedule and affidavit.

That the whole of the debts due and owing at that time by the said Company, and therein particularly mentioned and set forth, still remain unpaid.

That said J. H. Bill further stated in his said affidavit that he was, and had been since May 18th then last, the clerk and general agent of the said Company, and had been during the greater part of that time at their works, his business being to take charge of the buildings, and to pay out the funds of the Company, and generally to attend to the business of the Company ; and that his position in the Company had enabled him to understand with accuracy its financial condition and the state of its accounts with individuals. That the defendants produced and offered as evidence an affidavit in the cause made by A. Dey, by whom the said mortgage of \$2,000 was given to Janet Blair, in which affidavit he states that he has no doubt that the debts of the said Company are truly stated by said J. H. Bill in his affidavit, which had been read to him ; which affidavit of said Dey is dated November 26, 1847.

That since the filing of the original bill by Kelly the said J. H. Bill has obtained a judgment against said Company for \$832,72, besides costs ; which judgment was obtained in the Circuit Court of Essex, on the 24th May, 1848, and was docketed in the Supreme Court ; and that an execution was issued thence to the Sheriff of Hunterdon ; but the complainants charge that the said judgment is fraudulent and void, and that the said Company were not indebted to the said J. H. Bill ; and if indebted at all, are not indebted beyond the amount of \$561,83, as appears by the said affidavit and schedule of said J. H. Bill, dated Nov. 27, 1847, in which he sets down his own demand at that sum. This bill prays that Janet Blair, Marmaduke Moore and J. H. Bill be made defendants in this cause with the said Company ; and that they may answer, respectively ; and that the said Janet be decreed to surrender the said mortgage for \$2,000 ;

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and that Moore and Bill be restrained from any further proceedings on their respective judgments; and that the receiver heretofore appointed be directed not to pay to the said Janet her said claim for the amount of the said mortgage; and not to pay to the said Moore and Bill their respective judgments; and for further relief.

On the 27th June, 1848, an order limiting creditors was taken.

On the 21st Sept. 1848, an order staying sale on the judgment of Bill was made; and on the same day a decree *pro. con.* was taken against the Company on the original bill of Kelly against the Company; and on the same day a decree *pro. con.* on the supplemental bill was taken against Moore, Bill and Janet Blair.

On the 22d Sept. 1848, an order was made that the receiver sell the real estate subject to the mortgage of Rockafellow and the \$500 mortgage of Janet Blair.

On the 23d Sept. 1848, an order was made giving the receiver 30 days to answer the bill of Janet Blair against the Company.

On the 3d Nov. 1848, the receiver put in his answer to the bill of Janet Blair.

He denies that there is anything due her upon the mortgages stated in her bill; but says that the same are, as he is informed and believes, entirely fraudulent and void. That Dey, having obtained a transfer of the stock of an insolvent Company, reorganized it among his relatives and friends, by distributing a few shares to each; they becoming Directors in the new concern. That Dey also procured an assignment to himself of an article between Peter I. Clark, Esq., and Jacob Rockafellow for the purchase and sale of the mining property formerly owned by the old Neshanic Mining Company. This answer states, (giving the facts and allegations on which the statement is founded,) that the \$500 mortgage to Janet Blair, as well as the \$2,000 mortgage to her, is fraudulent and void.

On the 17th Dec. 1848, Rockafellow put in his answer to Janet Blair's bill.

On the 2d October, 1848, Janet Blair presented her petition, stating, &c.; and stating that it would be injurious to the interests of the persons interested in the property to sell the engine, pump and fixtures separately. That she has heard of the order directing the receiver to sell the property subject to the mortgage of Rockafellow and the \$500 mortgage of Janet Blair, thereby excluding her claim on her \$2,000 mortgage; and no information was given whether they intended to sell the engine, pump and fixtures separate from the farm. She therefore prays an order on the receiver to suspend the sale until the matters of fact can be inquired into, and especially to enjoin the sale of the engine, pump and fixtures separate from the farm.

The petition of Janet Blair and Joseph H. Bill was also presented, stating, &c.; and praying that all orders restraining the Sheriff from proceeding to sell under the judgment and execution of said Jos. H. Bill may be set aside; and thereupon it was ordered that cause be shown on the 30th Oct. 1848, why all orders restraining the Sheriff from proceeding to execute the judgment of Jos. H. Bill should not be set aside, and the said Sheriff be permitted to proceed with the sale of the real estate of the Company, together with the machinery; and why the sale of the same by the receiver should not be enjoined; and it was further ordered that the receiver and the Sheriff be enjoined from selling until the further order of the court; and that the sale be adjourned from time to time until the foregoing matters be determined; and that a copy of said order be served ten days prior to the said 30th of October.

Geo. A. Allen for the general creditors.

F. T. Frelinghuysen for Blair and Bill.

THE CHANCELLOR. The question now submitted is, whether the judgment creditors, or either of them, shall be

permitted to proceed to sell under execution ; or whether the receiver shall sell ; and, in either case, how and when the property shall be sold ; whether the engine, pump and machinery shall be sold separately from the farm, or with the farm ; or whether the sale shall be deferred altogether until the question as to the validity of the judgments, and of the mortgages except the mortgage to Rockafellow, shall be determined, in the suits now pending, in which their validity is disputed.

The bill of Hezekiah Kelly was filed Nov. 12, 1847, charging that the Company, having ceased to pay debts on the 2d of Aug., 1847, suspended their ordinary business, for the want of funds to carry on the same, on the 9th of Nov. 1847.

On this bill an injunction was allowed, restraining the Company from collecting debts or transferring property.

The judgment of Moore was entered on the 5th April, 1848, on a writ returned in January, 1848.

The receiver was appointed on the 23d May, 1848.

The judgment of Joseph H. Bill was entered on the 24th of May, 1848.

The judgment of Bill was entered subsequently both to the injunction and the appointment of the receiver. Moore's suit, in which his judgment was obtained after the issuing of the injunction ; and his judgment was entered before the appointment of the receiver. The 5th section of the "Act to prevent frauds by incorporated companies" provides, that when any incorporated company shall have become insolvent, it shall be lawful for any creditor or stockholder to apply to the Chancellor, by petition or bill, setting forth, &c., for a writ of injunction and the appointment of a receiver ; whereupon the Chancellor may hear, &c.; and if it shall be made to appear to the Chancellor that the said company has become insolvent, &c., it shall be lawful for the Chancellor to issue an injunction to restrain the company from exercising any of its privileges or franchises, and from receiving any debts, and from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the company. And the 7th section of the said act provides, that it shall be lawful for the Court of Chancery, at the time of ordering the

said injunction or at any time afterwards during the continuance of the injunction, to appoint a receiver with full power to demand, sue for, receive and take into his possession, all the goods, &c., credits, moneys and effects, lands, books, papers, choses in action and property of every description belonging to the company at the time of their insolvency or suspension of business; and to sell, convey and assign all the said real and personal estate; and to pay into court all the moneys and securities arising from such sale, or which the receiver shall receive by virtue of the authority vested in him, to be disposed of by him, from time to time, under the order of the court, among the creditors of the company.

And the 15th section of the said act provides, that, in the distribution of the funds of the company, the creditors shall be paid proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. Independent of the question whether the judgments of Moore and of Bill, in this case, may or may not be considered as having been by confession for the purpose of preferring creditors, is either of them entitled to preference over creditors at large.

Bill's judgment can have no such preference, because it was not entered till after the appointment of the receiver.

Moore's judgment was entered before the appointment of the receiver, but not till after the injunction against the company as an insolvent company was issued. I am of opinion that no judgment is entitled to preference unless it was obtained before the granting of the injunction under the provisions of the said act. The whole property is locked up by the injunction; and the receiver, by the terms of the act, is to take possession of all the property belonging to the company at the time of the insolvency or suspension of business which induced the injunction. No other reading can be given to the act; and to attribute any other intention to the Legislature would be to suppose they did not foresee the consequences which would result from permitting judgments obtained after the injunction to have preference. Judgments would be confessed after the injunction.

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It may be said that a judgment confessed after the injunction would clearly be for the purpose of preferring creditors, and would therefore be within the provision of the act denying preference to judgments by confession for the purpose of preferring creditors. But suppose a suit regularly commenced by one creditor and proceeding regularly when the injunction was issued, and afterwards that creditor proceeded regularly and obtained his judgment in due course, would that judgment have preference?

If a judgment regularly obtained after the injunction would be preferred, would it make any difference whether the suit was commenced before or after the injunction? It would not be a judgment confessed; and, if the act contemplated that judgments obtained otherwise than by confession after the injunction should have preference, the language of the act makes no difference between suits commenced before and those commenced after the injunction.

I am inclined to think that the act contemplated only judgments entered before the injunction.

If a judgment obtained after the injunction might have preference if not by confession, &c., then the question as to Moore's judgment would be whether it is not to be considered as a judgment by confession; and if so, whether it was for the purpose of giving preference. I think that the orders restraining sales under the judgments should stand; and that the sale should be made by the receiver.

The next question is, how the sale shall be made: 1st, whether subject to the mortgage, or not so subject; and 2d, whether the farm and the mining tools and implements shall be sold together, or separately.

As to the mortgages of Janet Blair, their validity is disputed, and cannot be determined now. And in all cases of this kind, where receivers are appointed under this act, there may be a question as to the validity of asserted liens.

Is the receiver to wait until such question can be determined in the regular course of litigation; or is he empowered by the statute to sell irrespective of the incumbrances or alleged incumbrances?

By the 17th section he is to receive and take possession of all

the property belonging to the Company at the time of their suspension, and sell the same, and bring the proceeds into court, to be distributed from time to time, under the order of the court; and the 15th section provides, that in the distribution of the funds the creditors shall be paid proportionally to the amount of their respective debts, except mortgage and judgment creditors, when, &c.

It seems to me that the idea was that the receiver should sell the property irrespective of the incumbrances, and pay the incumbrances, according to their priority, out of the proceeds.

Perhaps the court might exercise a discretion and allow the property to be sold subject to admitted incumbrances, if it were probable that in that way the sale would yield a large sum for distribution among the other creditors, leaving such mortgage an existing lien. In that case the receiver would sell only the equity of redemption; and, whether the holder of that mortgage or some other person bought at such sale, the receiver would convey, not the property, but the equity of redemption only. If it be clear that the best way to sell, in this case, would be to sell subject to Rockafellow's mortgage, and if both parties desire it, I should be willing to direct the receiver to sell in that way. If not, let the receiver sell on the understanding that the purchaser is to have a free title.

As to whether the farm and the mining machinery should be sold separately or together, there are no means of determining; nothing to guide the discretion of the court. No ore has yet been found. If there is no ore there, it is manifest the machinery should be sold separately from the farm; for if the lands can only be used for farming purposes, the machinery is of no use there. True, if the probability that ore will be found is so decided that it is clear that further progress should be made, and that whoever should buy would buy with a view of continuing operations for reaching ore, it would be better to sell the machinery with the land. But upon this question sufficient light has not been given to enable me to decide upon the probability of reaching ore. But one of two courses is left: either to direct the receiver to sell in such way in this respect as he shall, on proper

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inquiry and investigation, think most advisable, or to act upon the best conjecture I can form myself as the best mode of sale.

One thing may be said, the machinery, to be taken down and removed, might be of little value. The value of it to a person wanting it to take to some other place would be less by the expense of taking it out of the mine and removing it to such place.

I must suppose that the receiver will act diligently and fairly in inquiring and determining as to the probability of finding ore; and I am inclined to direct him to sell in such way in this respect as, upon such inquiry and investigation, as I have suggested, he shall think most advisable.

Order accordingly.

CITED in *Potts v. N. J. Arms and Ordinance Co.*, 2 C. E. Gr. 520.

JOSEPH BROWN v. ROBERT FOLWELL, ESTHER WILLIS and
others.

A Cedar Swamp, of 33 acres, was devised by N. F. to his executors with directions to sell the same. On the 8th August, 1836, the executors made a deed of it to J. E. C. and on the same day J. E. C. made a deed of it to T. I. F., one of the executors. In August, 1843, T. I. F. gave a mortgage on it to J. B. In October, 1846, a bill was filed by R. F. against the said executors to set aside the said deeds, and in January, 1848, they were decreed to be void; and the decree directed that the cedar swamp be sold by a master; and it was so sold, in May, 1848, and E. W. purchased it at that sale. J. B. was not made a party to that suit. In June, 1848, J. B. filed his bill on the mortgage given to him by T. I. F.; and in September, 1848, a decree *pro con.* was made for the sale of the mortgaged premises; and they were sold in January, 1849, and were bought by J. B. (leaving a balance due on his mortgage). R. F. and E. W. were not made parties to the said suit of J. B. E. W., after her said purchase at the master's sale, cut a part of the cedar growing in the swamp, and moved it to lands of a third person, where it was struck off at vendue to bidders; and J. B., after his purchase under the said decree on his mortgage, filed a bill against E. W. and said bidders, and obtained an injunction restraining the bidders from taking the wood so struck off to them, and restraining E. W. from further cutting. On the bill and the statements of the answer the injunction was dissolved.

On the 17th April, 1849, Joseph Brown, of Philadelphia, exhibited his bill, stating that one Thomas I. Folwell, of Philadelphia, being indebted to the complainant in \$9000, for money lent and advanced, executed to the complainant a bond dated August 23, 1843, conditioned for the payment to the complainant of \$9000 in one year, with interest payable half yearly. And that the said Thomas I. Folwell, being seized in fee, as he alleged, or of some other good and sufficient estate of inheritance of in and to a certain plantation and lots of land, in order to secure the payment of the said sum mentioned in the condition of the said bond, with the interest thereon, did, by mortgage, duly executed bearing even date with the said bond, convey to the complainant, in mortgage, all the following plantation and lots and parcels of land, situate in the township of Woolwich, in the county of Gloucester, being lately the residence of the said Thomas I. Fol-

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well, bounded as follows: (giving the boundaries); containing about 225 acres of land, meadow, cedar swamp and premises, be the same more or less. Also all that certain lot of meadow ground, situate in the township aforesaid, bounded, &c., containing about 35 acres, be the same more or less; a part of which premises the said Thomas I. Folwell claims title to under the will of his father, Nathan Folwell, deceased; a part thereof the said Thomas I. Folwell purchased of Enos Henderson and wife, by deed dated March 8, 1836; a part thereof the said Thomas purchased of John E. Caldwell, by deed dated August 8, 1836; and a part thereof of Catharine Foldcraft, by deed dated April 25, 1835. That the part so purchased of John E. Caldwell contained 33 acres of valuable cedar swamp, which is described and bounded in and by the said deed from Caldwell as follows: Beginning at three cedars, thence by Hutchinson's line, so called, south 57 degrees east, 56 chains 40 links; thence north 75 degrees west, 37 chains 70 links; thence north 27 degrees west, 23 chains, 70 links, to the place of beginning; containing 33 acres of cedar swamp and cripple, be the same more or less. That a large arrear of interest being due on the said bond and mortgage, this complainant, on the 16th June, 1848, filed his bill in this court against the said Thomas I. Folwell, and his judgment creditors on attachment; and, in September, 1848, obtained a decree of foreclosure, and for the sale of the mortgaged premises, for the sum of \$11,784, and \$61,20 costs; upon which an execution was issued; and on the 13th January, 1849, the said premises were sold, by one of the masters of this court, and were purchased by the complainant, for \$7000, leaving a balance of between \$5000 and \$6000 due to the complainant on his said bond and mortgage.

That, about the time when the complainant purchased the said mortgaged premises, Robert Folwell, the brother of the said Thomas, entered upon the said cedar swamp, and cut and took away a large quantity, supposed to be about 100,000 cedar rails, logs, poles, posts and stakes, the most of which have been hauled off and out of the said cedar swamp, upon adjoining land. That the complainant, residing in Philidelphia, had no knowledge of the said cutting until after he purchased the premises at the master's

sale, and after the removal aforesaid or some part thereof. That some time previous to the 9th of April, 1849, the complainant found that the said Robert Folwell had advertised the said rails, &c., to be sold at public sale on that day ; which advertisement was published in a weekly paper printed at Woodbury, and is as follows : (giving the advertisement). That the said Robert Folwell is represented to the complainant as insolvent, and does not own any property, so far as the complainant knows and is informed and believes, of any description, and is wholly unable to respond to the complainant in damages.

That the complainant attended, on the said April 9th, 1849, at the place of sale mentioned in the said advertisement, and deemed it his duty to state to the said Robert the circumstances of his title to the cedar swamp, and requested him to desist from the sale for one month, until the right of the complainant, or of said Robert or any other person, could be settled by agreement or reference to competent persons ; but the said Robert refused to postpone the sale. That the complainant showed to the said Robert a notice which he stated he should read to and distribute among the persons attending the sale, before the sale commenced, if the said Robert did not agree to a postponement ; which the complainant did, and then left for Philadelphia. That the said notice given by the complainant was a printed handbill, as follows : (giving it at length). It is a notice that " the 60,000 cedar rails offered for sale by Robert Folwell " that day, " having been cut on property on which I (the complainant) had a mortgage, and for which I the complainant) now have a deed, the public are hereby warned not to purchase said rails, as the subscriber (the complainant) claims the same, and will prosecute and hold responsible any purchaser or person who shall remove the same or any part thereof, until the right is fully settled in court of law or equity," signed Joseph Brown.

That the complainant is informed and believes that the said Robert Folwell went on with the said sale, and that William Crispin, Bowman Lippincott, and others unknown to the complainant were purchasers at said sale.

That the cutting and taking away of said property from the said swamp is a great injury to the complainant, by de-

priving him of the timber necessary for fencing his plantation ; and that the damage is beyond the mere value of the timber.

That the said Robert Folwell, combining, as the complainant is informed and believes, with Esther Willis, who, as the complainant is informed, claims title to the said swamp, &c., refuses to acknowledged the complainant's title to the said rails, &c., but denies the complainant's title to the said 33 acres of cedar swamp. And the said Robert Folwell and Esther Willis pretend, that the deed from the said John E. Caldwell to the said Thomas I. Folwell was set aside and for nothing holden, by this court, in a cause depending between the said Robert Folwell, complainant, and the said Thomas I. Folwell and Joseph C. Pancoast, executors, &c., of Nathan Folwell, deceased, defendants, on the 28th of January, 1848 ; and that the said cedar swamp was sold by order of this court, on the 25th May, 1848, by a Master of this court, and purchased by the said Robert Folwell, in the name of the said Esther Willis, but for the use and benefit of the said Robert Folwell ; whereas the complainant charges that he had no notice of that suit ; that he was not made a party thereto, nor had he any knowledge, directly or indirectly, thereof. That, the said deed from John E. Caldwell to Thomas I. Folwell being dated August 8, 1836, and duly recorded on the same day, without any claim, or objection to the same, to the knowledge of the complainant, and from the number of years which had elapsed since the making and recording of the said mortgage to the complainant, which was known to the said Robert Folwell, and the recording whereof was lawful notice to everybody, the complainant was entitled to have had notice of such suit between Robert Folwell and the said Thomas I. Folwell and Joseph C. Pancoast, executors as aforesaid, and that his rights could not be and were not affected by the decree in that suit.

That the complainant is informed, and therefore charges, that neither the said Thomas I. Folwell nor the said Pancoast appeared, or defended the said suit, or attended the examination of witnesses therein. That a decree *pro con.* was taken in said suit, and the whole proceedings therein were *ex parte* ; whether by collusion between the said brothers and Pancoast, who is a brother-in-law, the complainant submits to the court.

That the first knowledge this complainant had of the pretense or claim of the said Robert Folwell or the said Esther Willis was at the sale of the premises, on the complainant's execution, on the said 13th January, 1849, after the sale was opened, when the said Robert Folwell gave notice, in substance, so far as the complainant could understand, that a portion of the cedar swamp included within the bounds given by the said execution was claimed by him for Esther Willis.

That the complainant has since understood that the said Robert Folwell claimed the said cedar swamp for the said Esther Willis, before the sale to the complainant, and, upon inquiry being made of the said Robert Folwell, he declared that the said tract of cedar swamp was not within the bounds of complainant's mortgage; but he declared to the complainant, after the sale to the complainant, that the said swamp was and is within the bounds of the complainant's mortgage.

That, from the time of the complainant's purchase, the complainant is informed and believes, the said Robert Folwell has been making great exertions in cutting and removing the said rails, &c., from and off the said cedar swamp.

The bill prays an account of the rails, &c. which have been cut; and that the defendants may be decreed to pay to the complainant the value of such portion thereof as has been sold; and an injunction restraining the defendants from committing any further waste or destruction of or upon the said cedar swamp, and from removing the rails, &c. sold from the place where sold, and from carrying away other rails, &c. from the said tract of cedar swamp; and that the rails, &c. not sold, as well those lying on the said tract as those which have been removed from it, may be sold, and that the proceeds may be brought into court to be paid to the complainant towards payment of the balance of his mortgage debt; and for such other and further relief, &c.

Robert Folwell, William Crispin, Bowman Lippincott and Esther Willis are make defendants.

An injunction was allowed pursuant to the prayer of the bill.

The defendants put in their joint and several answer.

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They admit the mortgage from Thomas I. Folwell to the complainant; and that it was recorded as in the bill stated; and that it embraced the cedar swamp of 33 acres which Thomas I. Folwell purchased of John E. Caldwell, by deed dated August 8, 1836, and recorded as in the bill stated.

They admit that the complainant, on or about June 16, 1848, filed his bill on the said mortgage, and, in September following, obtained a decree of foreclosure and for the sale of the mortgaged premises, for the sum stated in the bill; and that an execution was thereupon issued, and a sale made, as stated in the bill; but whether said mortgage debt was *bona fide*, or what amount was due on it, they have no knowledge. That they were not, nor was either of them made parties to the said suit, nor had notice of the pendency thereof until the premises were advertised for sale under the said execution.

The defendant Esther Willis, admits that she claims title to the 33 acres of cedar swamp mentioned in the bill. And the defendants say, that the said cedar swamp was a part of the real estate whereof Nathan Folwell died seized. That the said Nathan devised the same, with other lands, to his executors, with directions to sell the same and divide the proceeds as in his will directed, and appointed Robert Folwell, one of these defendants, Thomas I. Folwell, Joseph C. Pancoast, Samuel Cornley and Isaac Pine executors. That Pine, Cornley and the said Robert Folwell renounced the executorship; and that the said Thomas I. Folwell and Joseph C. Pancoast proved the will and took upon themselves the execution thereof.

That on or about July 5, 1836, the said acting executors made a pretended sale of the said cedar swamp to one John E. Caldwell, for the nominal consideration of \$165, and on the 8th of August, 1836, executed to him a deed therefor. That the said sale was fraudulent, the consideration mentioned not being one-tenth of the value of the said cedar swamp at that time, and was in fact intended as a mere device and contrivance by which to equalize a fraudulent transfer of the said cedar swamp to Thomas I. Folwell, one of the said acting executors, to whom the said John E. Caldwell, on the same 8th day of August, and for the same nominal consideration of \$165, conveyed the said premises.

And the defendants say, that the said Robert Folwell, afterwards, on the 12th October, 1846, filed his bill in this court against the said Pancoast and Thomas I. Folwell, to set aside the said pretended sale as fraudulent and void ; and that such proceedings were thereupon had that, on the 28th January, 1848, it was by the decree of this court, among other things, decreed as follows: (giving the decree at length). It declares, that the sale made of the said cedar swamp by the said acting executors to John E. Caldwell, by deed dated August 8, 1836, for \$165, and which property was on the same day conveyed by the said John E. Caldwell to the said Thomas I. Folwell, was made without any sufficient consideration, and in violation of the trust reposed in the said executors, and in fraud of the rights of the complainant in that suit ; and decrees that the said sale and conveyance to Caldwell, and the conveyance from Caldwell to the said Thomas I. Folwell be set aside ; and that the said cedar swamp be sold under the direction of a master for the best price that can be obtained for the same.

And the defendants, Esther Willis and Robert Folwell say that, on the 28th May, 1848, the said 33 acres of cedar swamp were, by virtue of the said decree, sold at public sale, and struck off to this defendant Esther Willis, upon the bid of this defendant Robert Folwell, who bought the same for her and at her request and as her agent, for the sum of \$693. The said Thomas I. Folwell having previously to the sale cut and carried off a large portion of the timber growing thereon. That the defendant Esther Willis paid the said purchase money to the master, who thereupon executed and delivered to her a deed for the said property, dated June 24th, 1848.

That it was while the said Thomas I. Folwell held the said cedar swamp under the said pretended conveyance from J. E. Caldwell that he executed the said mortgage to Joseph Brown, the complainant ; and they believe that the object of the said Thomas I. Folwell in including the said swamp in the said mortgage was, to provide against the contingency, anticipated by him, of said conveyance being set aside for fraud, by passing the legal title out of his hands ; and that the admissions of the complainant in his bill, that before the sale under his mortgage the said

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Thomas I. Folwell stated that the said swamp was not included in said mortgage, and that he was first informed that it was so included after he had purchased the mortgaged premises, confirms these defendants in their said belief, and shows that he did not understand that at the sale he was buying the said swamp, and that, therefore, the purchase money he gave was given for the other premises, not including the said swamp.

And these defendants insist, further, that inasmuch as the deeds, from the said acting executors to J. E. Caldwell, and from said Caldwell to Thomas I. Folwell, were both on record at the time said mortgage was given, and bore on their face the badges of fraud, the complainant, even if he meant to take this mortgage on the swamp, was chargeable with notice that the said pretended title of Thomas I. Folwell to the said swamp was fraudulent and void; and that the complainant is not entitled to be considered in this court as a *bona fide* mortgagee without notice of defect of title.

The defendants admit that the complainant procured an execution to be issued on the decree obtained on his mortgage and that he became the purchaser of the mortgaged premises at the sale under the said execution, embracing the said cedar swamp and a large amount of other real estate, for \$7000, which, the defendants believe, was little more than half its real value without the cedar swamp.

The defendant Robert Folwell says, that he attended said sale, and, as the agent of the defendant Esther Willis and at her request, forbade the sale of the cedar swamp; gave public notice to the bidders and to the said complainant that the said Esther was the owner thereof; and read the decree of this court setting aside the said deed to John E. Caldwell and the said deed to Thomas I. Folwell; and that the master who made the said sale also stated to the same persons present at the sale, publicly, that the title out of which the complainant's mortgage had grown had been set aside as fraudulent, and the said cedar swamp had been subsequently sold under the decree of this court, and purchased by the said Esther Willis.

This defendant admits that he entered upon the said cedar swamp and cut and took away a large quantity of cedar rails,

logs, poles, &c., as charged in the bill, and caused the same to be hauled off said premises, and sold the same. That they were removed from the said premises a distance of half a mile, and piled up on the fast land for the purpose of being sold; and that schedule A., annexed to this answer, contains a true account of the quantities of each kind thereof, and of the prices at which they were sold, and the names of the persons to whom sold, and the expenses of cutting and carting the same to the fast land and of selling the same; but that he acted, in all this, as the agent of the said Esther Willis, who was and is the owner of the said swamp; and at her request and by her direction. That he does not know whether the complainant had knowledge of the cutting or not, but that the same was done openly, and in the exercise of what he deemed the understood right of the said Esther Willis. That the complainant's tenants, who lived on complainant's farm adjoining, knew of the said cutting and carrying away at the time; and the complainant knew of the cutting and carrying away, at the time and before the said mortgaged premises were sold; and several conversations were held between this defendant, agent as aforesaid, and W. N. Jeffers, solicitor and counsel of the complainant, about the said cutting and the said cedar swamp, at the time of and previous to the sale of said mortgaged premises; and that the said sale was made upon public notice by advertisements in Woodbury and Camden, and also in Philadelphia; which advertisements, he admits, were in the form and language set out in the bill.

The defendant, Esther Willis, says, that the said cutting, carrying away and selling were by her direction and authority; and that the defendant Robert Folwell was employed by her to attend to her business.

The defendants Robert Folwell and Esther Willis admit that the said Robert is not a man of much property; though they deny that he is an irresponsible man as charged in the bill; but they say that the said Esther is the responsible person, who is able and willing to respond, &c.; and that she is a person of property, able to answer to any amount for damages that may be adjudged, &c.

The defendant Rob't. Folwell admits that the complainant

attended the said sale, of rails, &c., and gave some such notice as stated in his bill.

The defendants Crispin and Lippincott admit that they were purchasers at said sale, &c.

The defendants admit that the cutting and taking away of said property from the cedar swamp would be an injury and damage to the complainant if his title to said swamp was valid ; but they deny that he has a valid title to the same, and insist that the title is in the defendant Esther Willis.

The defendants Robert Folwell and Esther Willis deny that the cedar swamp was purchased by the said Robert in the name of the said Esther for his own use and benefit ; but say that the said purchase was made for the sole and exclusive use and benefit of the said Esther ; and that the said Robert has no other interest in the said premises or the property taken therefrom than what he has as the agent of the said Esther, who is the exclusive owner thereof.

The defendant Robert Folwell admits that the complainant was not made a party to the bill filed against Thomas I. Folwell and Joseph C. Pancoast to set aside the deeds to John E. Caldwell and to Thomas I. Folwell ; and that the reason was that this defendant had no knowledge of the fact that the said mortgage from Thomas I. Folwell to the complainant embraced the said cedar swamp ; that though the said mortgage was on record, it did not particularly describe the said cedar swamp by metes and bounds ; and this defendant did not know or believe that it embraced said swamp ; and that he had no suspicion of such being the fact until he saw the advertisements, a few days before the sale under the complainant's mortgage ; and that then, on inquiring of the solicitor and counsel of the complainant at the time of the sale, whether it did embrace the said swamp, the said solicitor and counsel told him it did not, and tried to dissuade the said Robert from recording the decree setting aside the said deeds, as aforesaid ; and the complainant, after he had bought in the mortgaged premises, told this defendant that he (the complainant) did not know whether they embraced the said swamp or not ; and this defendant attended the sale, and gave the notice forbidding any sale of the cedar swamp and asserting Esther

Willis' title, out of abundant caution, as he had not been able to satisfy himself whether the said swamp was embraced in the mortgage or not; but thought the description of the property broad enough to embrace it.

The defendants Robert Folwell and Esther Willis say, that at the time of the decease of the said Nathan Folwell they both resided in Philadelphia; and that they continued to reside there until 1846, in which year they both removed in New Jersey, where they now reside; and that, not being made parties to the complainant's foreclosure suit, they had no suspicion, until after his said decree and the advertisements for the sale of the mortgaged premises under it, that he had any pretence or claim or interest in the said cedar swamp.

The defendant Robert Folwell admits, that neither Thomas I. Folwell nor Joseph C. Pancoast appeared or defended the said suit brought by this defendant to set aside the said deeds to John E. Caldwell and to Thomas I. Folwell, or attended the examination of witnesses in the said cause, and that a decree *pro confesso* was taken against them; but he denies that there was any collusion between him and them or either of them; and denies that the first knowledge the complainant had of the claim of the said Esther was on the sale of the premises upon his execution.

The defendants Esther Willis and Robert Folwell say, that all the rails, &c., so cut were carried away; and that none thereof, of any kind, now remain on the said cedar swamp. They admit that about half of the said cedar swamp has been cut off; and that the said Esther intends to cut off the remainder.

On the bill and answer a motion was made to dissolve the injunction.

T. H. Dudley in support of the motion. He cited 1 *John. Ch.* 318; 8 *Ves. Jr.* 90, note; 2 *Green's Ch.* 282, 234, 429; 3 *Ib.* 177, 452; 6 *John. Ch.* 500; 7 *John. Ch.* 317; 1 *Pet. C. C. Rep.* 356; 2 *Bac. Ab.* 688; 1 *P. Wms.* 527; 5 *John. Ch.* 169; 3 *Alk.* 262; *Amb.* 54; 6 *Ves. Jun.* 51; 3 *Paige*, 213; *Story's Eq. Jur. sec.* 909; 7 *Ves. Jun.* 305; 19 *Ib.* 152; *Sax-*

ton's Ch. 476, 454; 3 *Bin. Rep.* 54; 4 *Ib.* 43; 2 *Halst. Rep.* 175; 6 *Ib.* 385, 393; 6 *Bin. Rep.* 118; 2 *Ib.* 466; 1 *Gallison*, 41; 2 *Sugd. on Vend.* 335, 542, 3, 4.

W. N. Jeffers, contra.

THE CHANCELLOR. For the present the injunction will be dissolved except as to further waste.

As to the rails, &c., which have been cut, they have been removed from the swamp, and have been struck off to bidders at a public vendue, at the place to which they were so removed. It is asked that the injunction be continued to prevent the bidders from taking them away from that place. If the injunction in this respect should be continued, it would be proper, the title being in dispute, that the court should direct a sale, and that the proceeds be brought into court to abide the event of the suit. But I see no good reason for this course. *Esther Willis* is responsible in trespass, if it be a trespass on property of the complainant, and is able to respond. And I am inclined to think that the injunction should be dissolved altogether. As to future cutting, the complainant would have the same remedy above mentioned, if he is in possession. If he is not, and it must be taken, under the pleadings, that he is not, ejectment and rule to stay waste will protect him. The title is in dispute; no action at law has been commenced; *Esther Willis* is able to respond; and there is, to say the least, nothing persuasive in the case, as it appears by the bill and answer, to induce the court to continue an injunction.

The injunction was afterwards wholly dissolved.

CHARLES J. WOLBERT, Jun., vs. RICHARD C. HARRIS, WILLIAM D. HARRIS, JOHN W. HARRIS and BENJAMIN M. HARRIS.

The exclusion of one partner by the other from participation in the business of the partnership is a ground for injunction restraining the excluding partner from collecting debts due the partnership, and for the appointment of a Receiver.

As a general rule, the Court will not order the business of a partnership to be continued by the Receiver.

The bill, filed March 28th, 1849, states, that the complainant, on the 24th November, 1848, was preparing to go into business at McCartyville, in the township of Washington, in the county of Burlington; and for the purpose of effecting that object and prosecuting his contemplated business advantageously, did, on that day, enter into a written lease under seal, between Mahlon Hutchinson, of Philadelphia, the Burlington County Bank, at Medford, and Thomas Haven of Burlington, of the one part, and the complainant, of the other part, witnessing, that in consideration of \$1, and of certain rents, covenants and agreements therein reserved and contained to be paid, kept and performed by the complainant, the said party of the first part leased to him and his assigns all that paper mill, grist mill, saw mill, mansion house, tenant houses and store house, with the land adjacent thereto, recently owned by the Wading River Canal and Manufacturing Company, situate at McCartyville aforesaid, to hold for two years from the 23d day of said November, 1848, payable yearly therefor \$1,000, in quarterly payments, the complainant also paying all taxes, not exceeding \$40 yearly, and keeping the premises in as good repair as they were then in, except such repairs as might be rendered necessary by the breaking of the dam or water wheels or the blowing up or bursting of the machinery; taking from the premises sufficient wood and timber for the doing thereof; wear and tear and unavoidable accidents excepted; it being

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expressly understood and agreed between the parties, that out of the first year's rent an amount not exceeding \$500 might be appropriated by the complainant towards putting said mills in repair.

That on the 24th of November, 1848, the complainant took possession under the said lease, of the said premises, including also a large amount of personal property purchased of the proprietors, viz: store goods, wood, &c., on the premises, of about the value of \$500, with the privilege of using and taking any such articles of furniture on the premises as might be needed, on terms hereafter to be agreed upon.

That he made arrangements with Mrs. McCarty to act as his housekeeper in the mansion house, at \$1 50 per week. That he brought stoves and bedding and a variety of articles of furniture; fitted up a bed-room for his accommodation; had his washing and mending done there; and proceeded in all things after the manner of permanent residents. That his wife remained with her parents in Philadelphia, until another room on the second story of the mansion house should be prepared, by putting up a stove, &c. for their better accommodation; expecting to move there before the then ensuing Christmas; and was alone prevented by the delay and disappointment of the desired repairs from making McCartyville her permanent residence, with the complainant, during the said term.

That Mrs. McCarty had immediately entered upon her appropriate duties; and the complainant proceeded with the general business operations of his engagement.

That on the 11th December, 1848, he entered into an agreement in writing, under seal, with Richard C. Harris, of Philadelphia, witnessing, that the said parties have formed a co-partnership for the manufacture of paper, carrying on grist mill, saw mill, keeping store, &c., on the said premises the said premises being *now* leased by the said Charles J. Woldert, Jun., for the mutual benefit and purposes of this co-partnership, under the name and firm of Wolbert & Harris, upon the terms and conditions following, viz: The partnership shall commence on the day of the date thereof, and shall continue until November 24, 1850, and so long thereafter as the parties shall mutually agree; the net profits of the business of the firm shall be equally divided;

and the losses equally borne. Neither partner to withdraw from the firm in any one year more than \$600; the balance of net profits to remain undivided during the partnership. Neither party to indorse any note or bill of exchange, nor use the name of the firm, except for the transaction of the regular business thereof; nor shall either, without consent loan any money on his own responsibility; and if either violates this article the other may forthwith annul the partnership and proceed to settle up the business thereof, and upon such settlement to pay over to such offending partner such sum as he may be entitled to. And if at the end of the lease the said Charles J. Wolbert, Jun., should be enabled to procure a new lease for the purpose of prosecuting the said business, it should be optional with the said Harris to continue; or if said Harris should obtain a lease of the premises, it should be optional with said Wolbert to continue or not. And in the event of one continuing the business and the other wishing to withdraw, he shall be paid a sum or equivalent to compensate him for the good will, fixtures, &c., that may have accrued since the formation of the partnership; and if the said equivalent cannot be mutually agreed upon it shall be determined by a third party mutually chosen. In case of difference of opinion in any matter relating to the business of the firm, the decision of a third party mutually chosen shall be conclusive. Subscribed, sealed and delivered, the said 11th December, 1848.

That, in pursuance of said agreement, the complainant and his said partner did thereupon proceed in the said business, upon the terms therein prescribed; having opened an account current with Wm. D. Harris, a brother of his said partner, at his establishment in Philadelphia, for stock, and materials requisite for carrying on the business of the said firm; the complainant continuing to reside at the said premises.

The complainant avers that he, as one of the said partners, proceeded in the conduct of the business of the firm in scrupulous observance and fulfilment of the stipulations and covenants contained in the said agreement of partnership, without objection or complaint on the part of his said partner.

That, having occasion to visit Philadelphia on the business of the firm, raising funds for the hands, and to provide

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additional machinery, he left the works on Sunday, the 4th of February, 1849, and the next day met with his partner at the store of the said William D. Harris in Philadelphia when arrangements were then made between them and the said Wm. D. Harris to raise funds for the use of the firm, upon their stock of manufactured paper in his hands; and it was then and there agreed, on the suggestion of the said Richard C. Harris, that he should go to the factory at McCartyville, and the complainant should remain in Philadelphia until the said Richard's return to said city in a few days. That during this time the complainant repeatedly called on Wm. D. Harris, who was receiving constant remittances of paper from the firm, to ascertain what amount of funds he was raising, &c. That, instead of giving satisfaction, he seemed desirous of evading the complainant's inquiries; and did not give an account, or specify any amount whatever; and finally refused to comply with the complainant's inquiries, or to give him any information on the subject; assuming a mastery in the business, as appertaining to himself as proprietor rather than to the complainant. And the complainant then inquired whether he had heard from Richard, and whether he did not desire the complainant to return to the works; and received for answer that "he had received no letter from the complainant." Whereupon the complainant became alarmed and suspicious, and said "Well, I'll go back anyhow." That the complainant had not heard from his said partner during all that period, though he afterwards understood that he had been in Philadelphia several different times during this interval. That the complainant had been greatly afflicted, while in the city on that occasion, for eleven days, with inflammation of the throat. That on Wednesday, February 28, 1849, he returned to McCartyville, when, to his amazement and confusion, he discovered that a strange revolution had taken place at the establishment. The bill, after stating some minor matters, proceeds to state, that the complainant then sought after the books of the firm where they had been usually kept; that they were locked up, and all writing materials missing. That he then went to the paper mill to see Isaac Brown, who occupied a house he had promised to James Gibson, another hand. That he found another man at work whom he had previously discharged; and upon inquiry he soon ascertained

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the existence of a mutinous conspiracy on the premises. The tender of the machine, John Cole, and other persons whom the complainant had himself employed upon taking possession of the premises, refused to obey his orders. The clerk, Benjamin M. Harris, a brother of complainant's said partner, had possession of the keys, and, upon request of John W. Harris, refused to deliver them to the complainant. That they locked up the store, and John W. Harris refused the complainant admission or an inspection of the books of the firm; refusing the complainant access thereto. That the said John W. Harris, the father of the complainant's said partner, with great rudeness and clamor interrupted the progress of the complainant at the premises, denying his authority; asserting that the complainant had no right there, with menaces of personal violence rudely pushing him aside at the store door, it being then locked; and forbade the workmen to mind or submit to the orders and requests of the complainant.

That the complainant was wholly at a loss to account for this sudden and extraordinary change until, two days after, he observed in the North American and United States Gazette of Feb. 27, 1849, the following notice:

"Dissolution of co-partnership. The firm of Wolbert & Harris is this day dissolved. All those having claims, and those indebted, will present them to me for settlement.

Feb. 27, 1849.

R. C. HARRIS."

That the complainant was astonished at the said publication, it being without his knowledge or the slightest intimation made to him. That immediately thereupon, on the 3d of March, 1849, he caused the following to be published in the same Gazette:

"Notice. An advertisement of the dissolution of the firm of Wolbert & Harris appeared in this paper on the 28th ult. No such dissolution has taken place, as the subscriber has not withdrawn from the said firm, nor authorized the previous notice. Any business negotiated by or for the firm of W. & H. must be authorized by me.

C. S. WOLBERT, Jr.,
Lessee of the Wading River Mills."

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The complainant avers that he is informed and believes, that the said Richard C. Harris, his co-partner, hath combined and confederated, by corrupt and fraudulent agreement with his said brother, Wm. D. Harris, his said father, John M. Harris, and his said other brother, Benjamin W. Harris, neither of whom is reputed or believed to be responsible; and that the said John and Benjamin do now assume to have exclusive charge and custody of the said mill property and estate and premises originally appertaining to this complainant, specified in his said lease, all of which accrued to the benefit of the said firm as aforesaid; and, acting as parties with or agents for the said Richard C. Harris and Wm. D. Harris, have and do forcibly exclude the complainant from any participation or influence in the conduct or management of the business of the said partnership, and from the use of the keys of the premises and accustomed entry into the store or inspection of the books of account of the firm.

The bill prays an injunction restraining Richard C. Harris, Wm. D. Harris, John W. and Benjamin M. Harris from receiving and collecting the debts due and to grow due to the partnership, or that may accrue out of the business transactions appertaining to the said premises since the 27th of Feb. 1849; and that a receiver be appointed; and that proper directions may be given for the conduct and management of said business in future for the sole use and benefit of the complainant, until he shall be restored to his original, individual and separate estate and interest in the premises under his said lease; and that he be enabled, by the decree of this court, to resume the business in his own name and to his own use and benefit, and fulfill and perform the covenants contained in the said lease, freed from all connection with or responsibility to the said Richard C. Harris; and that the said partnership may be dissolved; and that the said Richard C. Harris come to an account with the complainant of the partnership dealings and transactions from the commencement thereof to the said 27th Feb. 1849; from which day the partnership should be held to be dissolved by his own act; and that the said Richard, William, John and Benjamin come to an account of the business transactions appertaining to the said premises from and after the said 27th Feb., 1849.

An injunction was allowed and a receiver appointed.

Richard C. Harris, William D. Harris and John W. Harris put in their joint and several answer.

They admit that the complainant and Richard C. Harris were in partnership, under the firm of Wolbert & Harris, and carried on the business of paper making and a store connected therewith; but the origin and formation of the partnership and all the asserted transactions connected therewith are untruly stated in the bill, the facts being distorted and misrepresented.

Richard C. Harris answering for himself, says, that in March, 1848, the said Wolbert rented a paper mill in Delaware county, Pennsylvania; and it was proposed to this defendant, Richard C. Harris, to become a partner with him in carrying on said business. That he entered into articles of co-partnership with said Wolbert, dated March 27, 1848, as follows, (giving the articles.) This partnership was to continue until April 1, 1849, and thereafter, from year to year, so long as the parties thereto should mutually agree. Wolbert was to contribute ———, (the blank left for a sum is not filled up;) and Richard C. Harris a like sum. Neither was to withdraw from the firm in any one year more than \$364. (In other respects the articles of partnership stated in the answer are the same as set out in the bill). That, soon after the commencement of business under this firm, difficulties arose between the complainant and the owner of the property; and there was not a sufficient supply of water.

Hearing, in the course of a few months, that the property at McCartyville was to be rented, and having consulted with his partner in relation thereto, it was agreed between this defendant and the complainant, that the complainant should go and view the premises, and if in his opinion it would answer, rent the same for the use of the firm. That the complainant went, and rented the said premises; and in a few days the complainant and this defendant went together to McCartyville; were together with Mrs. McCarty, and made the arrangement for her to keep house, and united in fitting up the dwelling-house, in taking possession of the premises, and in every act done or proposed. He says it

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is not true that the complainant purchased any goods, or brought any to McCartyville at the time he mentions. That a quantity of goods, such as is mentioned in the bill, was purchased of the owners of the property; and a draft drawn by the firm of Wolbert & Harris on Wm. D. Harris; which draft was paid by said Wm. D. Harris. The complainant may have put a small old stove or two in the house, which is all the goods he ever had there.

He says that he left the drawing of the lease from the owners to the firm of Wolbert & Harris to the complainant; for he did not suppose he would practice a deliberate fraud on his partner; and this defendant's surprise was great when he discovered that the lease had been taken in the name of the complainant; but, as another lease could not be executed by all the parties without much trouble and inconvenience, and the complainant having finally agreed that a new article of partnership which should set forth that the lease was for the entire use and benefit of the firm, this defendant yielded to the measure. (The sentence is so in the answer. He says that the partnership entered into on the 27th March, 1848, had not been dissolved; but, considering that a new article of co-partnership was necessary, in consequence of a lease being drawn in his name, and a change of location, duration of time, and other slight alterations, such article was drawn and executed by the complainant and this defendant, and is, as this defendant believes, in substance the same set out in the bill, as by a duplicate, &c., will more fully appear.

He insists that the allegation in the bill that the complainant entered into co-partnership with this defendant after he obtained the lease for the works and premises is erroneous, as he originally leased the said premises by parol, on or about Nov. 1, 1848, for the firm, but afterwards, in drawing the lease, fraudulently suppressed the name of this defendant and that of the firm. And he says he is informed and believes, and therefore charges, that when asked by Mr. Haven, one of the lessors, why he took the lease in his own name when he had taken the property in the name of the firm, he replied that this defendant was only in partnership with him in the store; which statement this

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defendant charges to be false, as is proved by the said article of co-partnership above recited.

He says that, on or about Nov. 28, 1848, this defendant commenced operations at McCartyville, and pursued the business of the firm with fidelity and industry ; so much so as seriously to affect his health ; but soon the complainant began to show his true character. He was not in McCartyville one-third of his time. He was in Philadelphia, attending amusements ; paid very little attention to the business of the firm. He undertook to keep the books of the firm, but did not do it ; and what he did do few people can understand. He assumed the right to dictate, throughout all the works, in the most rude and boisterous manner. He endeavored to obtain credit for goods in Philadelphia, while idling his time away in that city ; but no one would trust him without a guarantee of this defendant or his brother. He collected and took up money in the city where goods had been delivered by the order of Wm. D. Harris, to whom such goods had been charged ; and, while thus wasting his time in the city, this defendant sent to his brother Wm. D. Harris 50 reams of paper, which were placed in his store in Philadelphia ; and while said Wm. D. Harris was gone to dinner, the complainant, having ascertained that the goods were there, removed the same to an auction store, and obtained an advance upon it, and it was sold the next day and the money received by him. He appropriated money of the firm to his own private use whenever he could obtain it. He obtained estimates for large improvements of the property at McCartyville, of which the firm were mere tenants, with cupolas ; and squandered the money of the Company in going to and from the city when there was not any business to be transacted, and the only course of business was to make what paper we could and send it to Wm. D. Harris, who would sell the same and advance us stock and money as we wanted it. The complainant proposed to open a store for the sale of our manufactured paper in New York, and threatened to do it in order to enlarge the credit, or rather the indebtedness of the firm. He admits that the strange conduct of the complainant excited his suspicions, and induced this defendant to believe that

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the complainant's object was to engross a large amount of property in the hands of the firm, by reason of the credit of this defendant, through his connections and friends, and take the chance of fortune for the payment.

And this defendant is informed and believes, and therefore charges, that the complainant, when inquired of by this defendant's father as to the prospect of profits, said that he was determined to run the firm to the utmost of its credit, and take care of Wm. D. Harris and Mr. Fisher, and let the other creditors whistle for their money.

That this defendant found that the complainant had no means; that he had failed in business before; that notes were given by him for his old debts; and that the firm of Wolbert & Harris was liable to be broken up and its credit ruined by suits against him and levies upon his interest in the firm. That this defendant was obliged to settle a claim against him on account of his old debts, to prevent judgment and execution, by paying the costs.

That from his labor and exertions at the works he brought on an attack of disease which required medical attendance, and he left McCartyville for Philadelphia, leaving the complainant in charge of the works; and in a few days the complainant left McCartyville also and came to Philadelphia, leaving all the works in the care of the workmen, without any superintendence, orders or instructions. But the complainant did not call on this defendant, nor was there any proposition to raise funds, nor did he come for any such purpose, as none could be raised until the stock on hand could be worked up and remitted to Philadelphia.

Under these circumstances, and finding it impossible to continue the business of the firm any longer, as he could not obtain any further advances, and that the firm was indebted to his brother in \$2,636.54, and was insolvent, without any prospect of being able to make payment, he caused a full and fair inventory of all the stock and personal property belonging to the firm to be made at McCartyville, at the cost of said property, and, on the 22d Feb., 1849, sold and transferred the said personal property to the said Wm. D. Harris.

He says he has not received any money from said firm,

except about \$60, for his own personal use, from the formation of the partnership, in March, 1848; that he made this transfer as the only means of paying the debts of the firm of Wolbert & Harris, as every article contained in the said inventory, all the goods and chattels of every description at the works having been supplied by the said Wm. D. Harris, or the payment thereof guaranteed by him.

That upon such transfer the amount of the said inventory, being \$1,103 21, was credited to Wolbert & Harris, leaving a large balance due said Wm. D. Harris; and the said John W. Harris, the father of said Wm. D. Harris, was appointed the agent of the said Wm. D. Harris to take charge of the said works at McCartyville.

And this defendant, considering that Wolbert had violated the said articles of co-partnership in every essential part, admits that on the 27th of February, 1849, he published a notice of the dissolution of the co-partnership as set forth in the bill; as he submits he had a right to do.

He says that in the forming of the partnership, in March, 1848, the arrangement was made with Wm. D. Harris, who was and is largely dealing in the business of paper and the stock and materials for making paper, that he should furnish the stock and funds for establishing and carrying on the manufacture of paper; and that all paper made by the firm should be sent to him in Philadelphia; and that he should be allowed 5 per cent. commissions on all the paper manufactured, for his advances and agency; and that this agency continued up to the day of assignment and transfer of the property, on the 22d Feb. 1849.

He denies that there was any arrangement made between the said firm and Wm. D. Harris to raise funds for said firm; the said William having refused to furnish any more funds until he should be paid for what he had already advanced or a portion thereof.

He admits that he saw the complainant at the store of his brother in Philadelphia, about the time mentioned in the bill; he had but little conversation with him. He denies that there was any arrangement with the complainant that this defendant should go to the factory in McCartyville and that complainant should

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remain in Philadelphia. He went to McCartyville of his own accord, as an act of duty, to look after the interests of the firm ; which interests he had deserted.

He denies that there was any combination or agreement to injure the complainant, or any such intention or motive. His brother William being a large creditor, and having guaranteed all other debts except a small balance to the workmen, whom he is willing to pay, as the firm had no credit, and now fully understanding the character of the complainant, he proposed to transfer the property of the firm to his said brother William, who agreed to carry on the works, and, if any profits should be made, to carry such profits to the credit of said Wolbert & Harris, in liquidation of their debt.

He says his father has no interest in the business. That his brother Benjamin is under 21, and was fixed upon as the clerk of the firm, and had no interest in the concern except his stipulated salary.

He says he is ready to come to an account with the complainant of the partnership transactions from the commencement of the partnership business to the dissolution thereof. And he agrees that the partnership is or ought to be dissolved and the property restored to the said Wm. D. Harris, as the only means of paying said debts ; and he prays that the court will so order and decree.

And Wm. D. Harris, answering for himself, says that in March, 1848, being in the paper business, and having on hand a large stock of goods for the manufacture of paper, it was proposed to employ Wolbert, who was out of business and had formed some acquaintance with this defendant, in a paper mill ; and, in pursuance of such proposition, Wolbert, on or about March 22, 1848, rented a paper mill in Delaware county, Pennsylvania ; and between that day and the 27th of the same month, it was arranged that Richard C. Harris should form a partnership with Wolbert in that business. This defendant then supposed that Wolbert had some means ; and in drawing the article of partnership the 2d article stipulated that he should contribute as his share of the capital stock, the sum of ———, and that Richard

C. Harris should contribute a like sum. But when the article was about to be completed Wolbert said he had no money or means, and that the co-partnership must fall through unless this defendant advanced the capital; and as the mill had been rented, and this defendant was anxious to aid Wolbert, and believing he had honesty, industry and integrity, in all which he has been disappointed, he agreed to advance the capital necessary to commence and continue operations, upon condition that all the paper made should be sent to his store in Philadelphia, and that he should have 5 per cent. commissions on the paper made and sold, for his agency and advances, that being the usual allowance; which advances he made, and the firm commenced business at said mill in Pennsylvania; every dollar of the capital being advanced by him. He also aided in procuring hands and workmen.

In a short time it was found that the mill in Pennsylvania did not answer, there not being sufficient water. And this defendant being in New Jersey after workmen he learned that the McCartyville works were to let, and recommended to Wolbert & Harris to see the works, and if they would answer to take them and give up the works in Pennsylvania. They did so; and under the same agreement this defendant furnished the capital to carry on the business at McCartyville. He furnished the money to pay the expenses of going down to view the premises. The said firm of Wolbert & Harris had no credit; and the defendant guaranteed the payment of store goods and such articles as were wanted and he had not on hand or did not deal in.

The said firm commenced operations about Nov. 29, 1848, at McCartyville; and it was soon perceived that the complainant did not attend to the business of the firm. He was often seen in Philadelphia taking his pleasures, and constantly soliciting money from this def't; and though this def't believes that his brother Richard worked hard and did all in his power in the business, yet the remittances of paper came in slowly and in small parcels. In the meantime Wolbert was in the city endeavoring to lay his hands on every dollar he could obtain, which disappeared so soon as he received it. And, upon a load of 50 reams of paper coming from McCartyville and being placed in this defend-

ant's warehouse, Wolbert induced this defendant's porter, while this defendant was gone to dinner, to allow him to take said 50 reams of paper, and Wolbert took it to an auction store, received an advance upon it, and it was sold at auction the next day, and Wolbert received the proceeds of the sale thereof. And, in order that he might appear comfortable to return to McCartyville, this defendant was obliged to give an order upon his shoemaker and upon his tailor, rather than trust Wolbert with money. Hearing, about this time, of many acts and doings of Wolbert, and fearing that things were not going on right, this defendant requested his father, John W. Harris, to go and see how matters stood at McCartyville. He found things in a bad state; and upon his representing to Wolbert the impossibility of continuing under such circumstances without utter ruin, Wolbert stated that he intended to get all the property into his hands, or the hands of the firm that he could by credit; and said, "we (the firm) will take care of your son (this defendant) and Fisher and you, and the rest may whistle for their demands. If they will only hide, I will steal." And on his journey from McCartyville to Philadelphia, on the 14th January, 1849, Wolbert detailed to the said J. W. Harris, as this defendant is informed by said Harris, that he, Wolbert, had arranged the prize fight between Rusk and Freeman, some two or three years ago, which resulted in the death of Freeman; and boasted that he got up the fight and held the stakes until two or three days before the fight. The conduct of Wolbert so shocked and alarmed this defendant that he resolved to have as little intercourse as possible with him; and on or about the 22d Feb. 1849, the said firm was indebted to this defendant in \$2,636.54; and upon inquiry of his brother this defendant found the whole amount and inventory of property at McCartyville amounted to \$1,103.-31; and that the goods and other property was being wasted, and in a short time would all be exhausted, and no means left to pay this defendant or any other person.

Under these circumstances this defendant agreed with his brother Richard to purchase the said goods, chattels and property of the said firm, and did purchase the same, at the cost prices set down in the inventory, amounting in the whole to

\$1,103.31, and gave credit to the said firm in liquidation of their indebtedness to this defendant ; and after giving every credit the said firm owed this defendant on that day \$634.04.

This defendant agreed with the said firm, through the said Richard, that he would run the said works, and if any profits should be realized the same should be credited to the said firm in payment of their indebtedness to him. This defendant requested his father, J. W. Harris, to take possession of the property, and authorized him to continue B. W. Harris as clerk in the store.

He denies that he was actuated by any fraudulent motives, or was guilty of any impure or fraudulent conduct. That he believed then, and does now, that it was the only way of saving the property from the reckless and fraudulent conduct of Wolbert ; every dollar of which had been furnished by this defendant. He admits that Wolbert did occasionally hang about the store, and may have asked the question stated in the bill ; but this defendant had other business to attend to, and may have felt too much repugnance to attend to him. He insists that he had a right to purchase the said property of the said Richard C. Harris, as the partner ; that it is his lawful property and ought to be restored to him. That the stopping of the said works is a great injury to him in his business, and to the laborers and workmen and their families dependent on this defendant, who are thereby thrown out of employment.

That this defendant also has contracts for the delivery of paper, with his customers, whereby he will sustain great loss and injury ; and he offers to give the most ample and satisfactory security, to be fixed by this court, to answer any damages or any decree which may be made in this cause. And he prays that, upon giving such security, the injunction issued in this cause may be dissolved, and the proceeding appointing a receiver be set aside.

John W. Harris, answering for himself, says, that being authorized by his son William D., he took charge of the mills and property at McCartyville, after the same was sold and conveyed to the said William D. by Richard C. Harris, partner of Wolbert, and carried on the the business for the said Wm. D. Harris and in

his name. The business went on much better than before. The hands were entirely satisfied, and we made a considerable quantity of paper, which was sent to Wm. D. Harris in Philadelphia.

On the 28th February, 1849, Wolbert arrived at McCartyville, came into the store and went behind the counter. After remaining a short time he went out, and the store door was locked. He went into the mill; and soon came to this defendant and demanded some keys. This defendant replied that he could not give him the keys, as the property now belonged to William D. Harris, whose agent this defendant was. This defendant was standing at the store door. The complainant demanded the key of the store door and it was refused him. He got into the store through the window, breaking the sash and glass; went directly to the money drawer, broke the lock of the drawer and took out the money, about — dollars, and returned with it through the window. As this defendant demanded the bag of him, he struck this defendant a severe blow on the hand, and said "take that;" and shortly after went to the stable, broke the lock and took out a horse belonging to the premises which was transferred with the other property to the said Wm. D. Harris, and made his escape to Philadelphia. The horse has not been returned; and this defendant has reason to believe that Wolbert has sold him and put the money in his pocket. He says he has no interest in the controversy; and denies that he entered into any fraudulent combination with his sons mentioned in the bill of complaint, or with any other persons, to injure the complainant and turn him out of the property. He requested the hands to treat Wolbert with civility, but not to obey his orders.

On this answer a motion was made to dissolve the injunction, and vacate the order appointing a receiver.

W. N. Jeffers in support of the motion. He cited 3 *Kent's Com.* 40, 41, 45, note A., 46, 53, 4, 60; 3 *John. Rep.* 68; *Paige*, 30; 1 *Montag. on Partn.* 22, note, 23; 5 *Cranch* 289, 300; 7 *East* 211, 213; 12 *Mass. Rep.* 54; 11 *Ib.* 476, 481.

S. R. Hamilton and *W. Halsted* contra. They cited *Story on Partn.*, pages 156, 7, 8, 9, 461; 4 *Wash. C. C. Rep.* 232; 5 *Paige*, 40, 1; 5 *Barn. & Ald.* 405.

THE CHANCELLOR. On the bill and answer there can be little doubt that the partnership will be dissolved. Both parties ask a dissolution; and the circumstances seem to require it.

The injunction, so far as it restrains the defendants from receiving and collecting the debts due or to grow due to the partnership, was proper; and the appointment of a receiver for the purpose of collecting such debts and taking charge of any remaining property of the firm which he could get possession of was proper. The bill charges, and the answer admits, that the complainant was excluded from the premises. This is a prominent ground for such injunction and the appointment of a receiver. 1 *Swanst.* 481; 1 *Turn.* and *Russ* 496. I do not see that either branch of the motion can prevail. What the receiver should do in this case under the charges in the bill and the statements in the answer is another question. The bill and the prayer of it extends to the restraining the defendants from receiving and collecting the debts that may accrue out of the business transactions appertaining to the premises since the 22d of February, 1849, the day on which the alleged sale and transfer of the partnership property by Richard C. Harris to William D. Harris was made; and that proper directions may be given to the receiver for the conduct and management of the business in future, for the sole use and benefit of the complainant, until he shall be restored to his original, individual and separate estate and interest in the premises under the lease mentioned in the bill, and he be enabled by the decree of this court to resume the business in his own name and to his own use and benefit. Whether the complainant is right in his claim that the lease was made to him individually and must be so considered in this court is a question to be settled, not on this motion, which is a motion by the defendants to dissolve the injunction and vacate the order appointing a receiver, but on the final hearing. And

this question has not been affected by the order for injunction and receiver.

There is no application now before the court for directions to the receiver to proceed in the conduct and management of the business to the end contemplated by the complainant in his bill. The court, therefore, could not now act in reference to the right claimed by the complainant that the lease is his individually. And, again, if the lease belongs to him individually, and he has been excluded from the premises, he has an immediate remedy at law. If, as claimed by the answer, the lease is to be considered as made to the partnership, it is not probable that an application by the complainant for instructions to the receiver to proceed with the business until the determination of the cause would be successful. The object of the court in appointing a receiver on a bill for the dissolution of a partnership is the care of the partnership property until the cause shall be decided, not the conducting of the business of the partnership. It is the court itself, that, by its officer, the receiver has the care of the partnership property, and that, not in behalf of the complainant or defendant only, but of all the parties. As a general rule, the court will not order the business to be continued by the receiver.

In either view of this question as to the lease, no action of the court as to the possession of this mill, &c., can now be had; for the reasons before given. And, further, this court could not properly change the possession—turn a third party out and put its officer, the receiver into possession, as between the partnership and a person claiming the lease adversely to the partnership. On the other hand, if the lease shall be considered as made to the partnership, the course of the receiver will be to sell the lease, as well as the other property of the partnership of which he can obtain possession. As to the argument for dissolving the injunction derived from the fact or allegation that the party now in possession is conducting business for himself and on his own means, I do not see that the general order made for an injunction pursuant to the prayer of this bill restrains him from so doing. True, the bill prays that the defendants may be restrained from receiving and col-

lecting the debts due or to grow due to the partnership, *or that may accrue out of the business transactions appertaining to the said premises since the 22d of February, 1849*; but this last clause must relate to what might be considered business transactions of the *partnership*, before dissolution decreed. It cannot relate to the business transactions of a third person, William D. Harris, in possession of the premises and doing business there on his own means.

If the injunction issued is broader than the prayer of this bill, or the defendant, Wm. D. Harris, is apprehensive that the language of the prayer of the bill restrains him from proceeding to carry on the works on his own means while holding possession of the premises, the injunction will be modified. This court cannot now turn him out and put the complainant in. He keeps possession at his peril; and while in does what he pleases, also at his peril. If the lease belongs to the complainant individually, he must resort to his legal remedy to recover possession of the premises.

The matters of difficulty, as things now stand, might be presented to the court, by either party, on an application for directions to the receiver.

The only question now before the court is, whether the injunction shall be dissolved and the order appointing a receiver vacated. I see no ground on which the motion can succeed. It may be observed here, in addition, that even if the lease be considered as made to the partnership, and if the alleged sale and transfer of all the other property of the partnership by Richard C. Harris to Wm. D. Harris can be supported, yet, as the lease was not assigned, (it is not stated in the answer that the lease was sold and assigned by Richard C. Harris to Wm. D. Harris,) it does not appear by what right the complainant could be excluded from the premises.

Motion denied.

Subsequently, a petition was presented to the court by Wm. D. Harris, stating that after he purchased the interest and property of Wolbert & Harris as mentioned in the pleadings, he sent to the fac-

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tory at McCartyville several articles of machinery, store goods, and materials for the manufacture of paper, of the value of \$859, which was and is his exclusive property. That he is informed and believes that the receiver appraised the said machinery, store goods and materials so sent to McCartyville after such purchase on the 22d of February, 1849, and also about \$350 worth of paper made by the petitioner at his individual expense; and the said receiver retains the possession thereof.

That the petitioner is informed and believes that the store has been opened since the injunction was served and robbed of a portion of the property of the petitioner; and that he has just cause to fear that his property at McCartyville will be entirely wasted, destroyed or sacrificed. That he has paid debts of the firm of Wolbert & Harris of more than \$200 since the 22d February, 1849, in pursuance of the agreement with said Richard C. Harris; and there are no debts due to the firm of Wolbert & Harris.

He therefore prays that directions may be given to the receiver to deliver to him such machinery, goods and materials as he sent to McCartyville while the works were in his possession, after the 22d February aforesaid. That the receiver may be directed to deliver to him all the property he purchased of Richard C. Harris, the partner of Charles J. Wolbert, on the 22d Feb. 1849, upon his giving security to answer the appraised value thereof if this court shall decree that the sale to him by Richard C. Harris is not a valid sale. And that the receiver may be directed to permit him to carry on the business of making paper at the works at McCartyville on such terms and conditions as may be fixed and ordered by the court.

An application was also made on the part of Wolbert for instructions to the receiver; Wolbert claiming that, if either partner is to be permitted to carry on the business, he is the one entitled to do so.

T. W. Mulford for Wm. D. Harris.

W. Halsted for Wolbert.

THE CHANCELLOR directed the receiver to deliver the store goods to Wm. D. Harris on his giving security to account for them if the result of the suit required; and that the receiver deliver to him any goods belonging to him individually. But declined giving directions to the receiver to continue the works at the mill, or to permit either party to do so; and directed the receiver to sell the lease, and close the business; and that the accounts be stated.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS

OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
AT APRIL TERM, 1848.

JOSHUA DOUGHTY, appellant, and THE SOMERVILLE and EASTON RAILROAD COMPANY, respondents.

On appeal from an order dissolving an injunction, the Chancellor granted an order staying the proceeding to restrain which the injunction had issued, until the next sitting of the Court of Errors and Appeals. A motion was made in that court, at its next sitting, for an order extending the stay until the hearing on the appeal.

Held, that the Court of Errors and Appeals had power to make such an order; but that the granting or refusing it rested in the sound discretion of the court. It was denied in this case.

The bill in this case, and the proceedings thereon in the Court of Chancery, will be found *ante*, 51.

P. D. Vroom and *A. Whitehead* in support of the motion.

B. Williamson and *F. T. Frelinghuysen* contra.

RANDOLPH, J. Mr. Doughty filed his bill in the Court of Chancery, setting forth such matters which the Chancellor deemed sufficient to authorize him to enjoin the defendants

from further proceeding, and which if correct, according to his allegation and understanding, would be sufficient to warrant a perpetual injunction; but the Chancellor afterwards, on application, made an order dissolving the injunction; and from that order the complainant has appealed to this court, as he has a perfect right to do, as well by the practice of the court as by statute. 26 *Wend.* 115; 4 *Jno. R.* 310; *Rev. Stat.* 921. The Chancellor having granted a stay of proceedings until the coming in of the appeal, we are now asked to extend that order to the hearing; and the first question raised, is as to the power of the court to grant such an order; it being, as alleged, an exercise of original jurisdiction, and we but an appellate tribunal. I had supposed that the question of power had been considered settled in this court, as well from its various exercises as from the discussion and opinions delivered in the *Chegary* case. The right to grant such an order must exist in the very nature of things. To deny it is to deny the right of appeal in the case; for if we have no power to protect the subject matter of the appeal, then is the right nugatory. It would be worse than useless for us to hear the merits of the appeal argued, and to decide thereon three or six months after the evil complained of has been suffered to be committed, and has become irremediable or the injury irreparable. Nor is the granting a temporary order at this time any more an exercise of original jurisdiction than the reversing, at the hearing, of the order of the Chancellor dissolving the injunction; for that would be in fact granting a perpetual injunction. If we have that power, as of course we must have, then we must also have the power to protect the rights of the parties within the jurisdiction of the court until the cause can be heard. And as a mere question of power or right of jurisdiction, I see no distinction between this case and the ordinary case of a stay of execution or proceedings in the court below. Both are dependant on precisely the same principles; but in the exercise of the power by this court, there may be much more difficulty and delicacy in the one than in the other. Why is it that we grant, even as a matter of course, a stay of proceedings in the court below? Why, simply to preserve our own jurisdiction of the case, and to protect the rights of the

parties till they can be heard, according to the rules and practice of this court. And is not the granting a rule of the kind now asked for, precisely for the same purpose, based on the same principles? The ordinary rule, perhaps, stays an execution and sale of mortgaged premises, which might be set aside and the parties restored to their rights without the order of stay; but cases may arise when, unless such a rule as is now asked for is granted, the property in dispute may be destroyed, before the hearing, or the parties placed in such a situation, that although we may then reverse the dissolution and revive the injunction, our whole proceeding may be nugatory and the party without remedy in this or any other court. So that in fact the reason for the existence of the power is stronger in a case of this kind than in an ordinary stay. Formerly the mere appeal was a stay to all proceedings; but about 1807 the rule was changed in England, 15 *Vesey*, 184; and the practice now is, either for the Chancellor to grant an order to stay proceedings till the hearing, or for this court, on application, to make the order. *Edw. on Injunctions*, 229; 15 *Vesey*, 182; 3 *Paige*, 381; and in *Sea Insurance Co. v. Ward*, (see 20 *Wend.* 590,) the Court of Appeals of New York recognized their power to modify or even dissolve an injunction before the hearing, when it becomes necessary to prevent the waste or destruction of the property. "We should do *here*," says Nelson, Ch. J., "what the Court below would be called upon to do in a judicious exercise of its powers." I am aware that most of the cases are those of mere ordinary stay of proceedings; but that arises in the first place from such being frequent, whilst such as the present case seldom occur. And in the next place, because the courts and the authors on the subject have never made and never could make any distinction in principle between one set of cases and another. They lay down the principles and the general practice, which apply to all cases, including, of course, those like the present. If injunction cases formed an exception to the general rule, I think some case or some author would have pointed it out, or some Court have refused the order to stay upon the ground of defective power in the court; but I find no such distinction or

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refusal. The ordinary rule of stay, and such as the present, we have seen and heard on the same principles. I think that we may go further, and say that they are only different modifications of the same rule; a decree is appealed from, and the ordinary rule stays all proceedings in the cause, whether in the Court below, or by its officers, or the parties, or others. For the time it puts a stop to the decree and to all proceedings by virtue thereof, and leaves the parties as if the decree had not been pronounced, and the judgment or deed thereby set aside in full force. So in a case like the present, the order to dissolve is appealed from, and a stay is a mere stay of proceedings by virtue thereof; that is, like the common order, it stays for the time the operation of the order appealed from precisely as if it had not been made, and whilst it issues no new injunction, it simply has the effect of reviving the old one, or modifying it, till the appeal can be heard; leaving it in force like the deed or judgment in the common case. And herein is the difference between the appeal from an order *dissolving* an injunction, and one from an order *refusing* an injunction. The former issues no new injunction till the hearing, but simply suspends till then the order complained of, leaving the case to stand as though the order had not been made; whilst in the latter case a stay is an original injunction, issued where none ever had existed before, and which could not be allowed without first hearing and deciding on the entire merits of the case; and yet even that could be allowed at the hearing—a pretty conclusive answer to the question of jurisdiction. Of the right to grant the rule I think there can be no doubt. As to the exercise of it in the present instance there is much more doubt. It must rest with the sound discretion of the court. Never to issue it, would destroy the right of appeal in such cases; always to grant it as of course, would be oppressive and require some modification of the power of granting injunctions, and render the dissolving an injunction and appeal equivalent to a continuation of the injunction. We must look not to the merits of the appeal so much as the circumstances of the case and the situation of the property. If the complainant is right in his positions and we to determine on the hearing of the appeal, then there is no power in the defendant to construct

the road through him, and it should not be done, because it may work a great injury to him, and be of no benefit to defendants. But if he is wrong, then an entire stay of the Company would be oppressive to them and injurious to the public. I think, however, that the Company may be suffered to go on and make and file their survey, and do every other act except the entering and breaking ground, so that when the appeal is determined, if it be for the complainant, no irreparable injury is done to him; and if for defendants, that they may immediately proceed and make the road through complainant's grounds; and that the order of stay should be modified accordingly.

In this opinion McCARTER, Judge, concurred.

GREEN, C. J. By the ancient practice it was held that an appeal from a Court of Equity stayed all further proceedings in the court below. But by the modern English practice, the appeal does not stay proceedings, but an order for that purpose must be obtained either in the Court of Chancery or in the House of Lords. 15 *Vesey*, 182, *Huquenin v. Basely*; 16 *Vesey*, 216, *Willan v. Willan*; 17 *Vesey*, 380, *Monkhouse v. The Corporation of Bedford*; *Eden on Inj.* 229.

The better practice seems to be to make the application to the House of Lords, for even the order staying proceedings may be appealed from. 15 *Vesey*, 182; *Lewes v. Morgan*, 5 *Price*, 468.

By our practice, an appeal from an interlocutory decree does not stay proceedings except by an order of this court or the Court of Chancery for that purpose. If an appeal from a final decree be filed in ten days, it prevents issuing process on the decree. *Rules of the Court of Chancery*, rule XX.

Prior to the Revised Statutes in New York, the appeal *ipso facto* stayed proceedings on the point appealed from. An order for leave to proceed was necessary. *Green v. Winter*, 1 *J. Chan.* 81; 2 *Hoffman's Chan. Pr.* 31; *Mesonier v. Kauman*, 3 *John. Chan. R.* 66.

The injunction being dissolved, the appeal cannot revive the process or give it force. It cannot be revived but by a

new exercise of judicial power. *Hoyt v. Gilston*, 13 *John. R.* 140; *Wood v. Dwight*, 7 *J. Ch. R.* 295; *Hart v. Mayor of Albany*, 3 *Paige*, 381.

It is, in effect, the granting of a new injunction. It is said that this is an original exercise of judicial power; and unquestionably it is so. It is thereupon objected that this is a mere appellate tribunal, and cannot exercise such power. The consequence does not follow. It may not exercise original power in acquiring jurisdiction over the cause. But that jurisdiction once regularly obtained, this court may exercise original jurisdiction over the parties, especially when the proceeding is *in rem*, and the object of the order to maintain unchanged, as far as practicable, the *status* or condition of the subject matter of the controversy during the pendency of the suit. It is on the same principle upon which a court of common law, in an action of ejectment or dower will make an order upon the party in possession, restraining the commission of waste. And a Court of Equity, prior to the hearing or argument, will, upon the same principle, grant a temporary injunction until the case can be heard. It is an inherent power in all superior tribunals, essential to the attainment of the object of litigation and the ends of justice. I am of opinion, therefore, that this court must of necessity have the power to make the order applied for. The power existing, is this a proper case for its exercise? The question presented is not whether the appellate court will stay proceedings in the court below, upon the point appealed from, pending the appeal; but it is, whether upon an appeal from a decree of the Chancellor denying or dissolving an injunction, the appellate court will grant a temporary injunction until the final hearing of the appeal. We are upon this point entirely without precedent except in our own State. No precedent can be found either in the House of Lords or in the Court of Errors of the State of New York, whose practice is strongly analagous to our own. The first case in this court, of which I have any knowledge, is that of *Suydam v. New Jersey Railroad Company*, at January term, 1849. That order, it is well known, was obtained by surprise, without notice, in the absence of the opposing coun-

sel, and under circumstances which should prevent its ever being resorted to or relied upon as a precedent. The language, moreover, in which it is couched, leaves it extremely doubtful whether the court were in fact apprized of the real design of the order. It purports to be a mere order to stay proceedings upon the decree.

In the case of *Chetwood v. Brittain*, at May term, 1843, an order was granted in express terms staying proceedings at law. This is stated in the order to be by consent.

Since the present organization of the court, at July term, 1845, a similar rule was granted in *Chegary v. Scofield*. This rule, too, was obtained by surprise, without argument, in the absence of opposing counsel; and at the succeeding term was set aside by a decided vote of the court. Unfortunately the precise ground of setting aside the order does not appear. It may have been, and probably was, upon the ground that it went beyond the prayer of the original bill, and was made to operate upon persons not parties to the record. It is worthy of notice that both in *Chetwood v. Brittain* and in *Chegary v. Scofield*, the injunction was merely auxiliary to the main design of the suit. The object of the bill in one case was to avoid a bond; in the other, a Sheriff's sale. The injunction in the former case restrained a suit at law upon the bond; in the latter, the delivery of the Sheriff's deed. In both cases the order restraining proceedings was made without the least reference to the merits of the case. The original design of the order was merely to restrain proceedings until the case could be heard. In neither case were the merits necessarily involved, nor could the order operate to the serious detriment of the party enjoined. But in the present instance the whole object of the bill is the injunction. The sole inquiry is, should the injunction issue? The Chancellor, upon a full consideration, has decided that the injunction should not issue. This court are now asked, not to restrain proceedings in the court below, but to restrain the Company from proceeding under their charter. The power of this court is invoked to arrest the construction of the road; to do, what upon mature consideration the Chancellor has decided ought not to be done. It is to reverse, at least temporarily, the

order of the Chancellor, and to grant the complainant *in limine* the prayer of his bill, before the cause has been heard, before his right to an injunction has been considered or settled in this court, and that, too, after a solemn decision in the court below that no injunction should issue. In many cases, and probably in this, a temporary injunction before final hearing will effect the design of the applicant as effectually as the granting of a perpetual injunction. It will work an irreparable injury to the party enjoined, and compel them, in order to avoid that evil, to submit to any terms which the adverse party may dictate. It is manifestly a very high and delicate exercise of power—one which should by no means be exercised as a matter of course, but only upon the most imminent necessity.

The granting of this order necessarily involves the merits of the whole controversy. The argument upon the motion has necessarily and unavoidably turned upon the merits. The cause has been argued precisely as if we were now upon the hearing of the appeal. I think the merits ought not to be heard upon this summary motion. The practice will lead unavoidably either to a decision upon a partial hearing, or to a prejudging of the case upon its merits, in contravention of the rules and practice of the court.

It is a power which, in all cases where the merits are thus necessarily involved, had better be left to the discretion of the Chancellor. He may properly exercise it, and with much more safety than this court are likely to do. He is familiar with the case, and may, without the necessity of a further argument, if he thinks the case demands it, grant a temporary injunction until the cause can be heard in this court. That course was adopted in the case of *Hart v. The Mayor of Albany*, 3 Paige, 386. The bill was there filed for the purpose of restraining the corporation of Albany from removing from the Albany Basin a floating storehouse, which the complainant had erected and moored therein, against the ordinance of the corporation. On filing the bill, an *ex parte* order was made for an injunction restraining the defendants from carrying the provision of the ordinance of the corporation into effect. On the coming in of the answer the injunction was dissolved. From

that decree Hart the complainant appealed. Pending the appeal the corporation were proceeding to carry the ordinance into effect by taking down and removing the storehouse. The appellant thereupon applied to the Chancellor for an order restraining proceedings pending the appeal. And upon the complainant's solicitor stipulating to expedite the cause so as to bring it to a hearing at the next term of the Court of Appeals, a temporary injunction was granted by the Chancellor until after the next December session of the Court of Appeals, unless the appeal should be sooner disposed of by that court.

The exercise of this power of the Chancellor may always preserve, *pendente lite*, the just rights of the parties litigant. There is no necessity for its exercise by this court.

The opinion of the Chancellor in *Monkhouse v. The Corporation of Bedford*, 17 Vesey, 380, shows that the power even in that court will be exercised with great caution, and only when it can be done consistently with the rights of the party in whose favor the decree is made. The exercise of the power by this court in cases circumstanced like that now under consideration, will unavoidably be productive of serious evils without any corresponding benefit. It would be far better, and more conducive to the ends of justice, to permit the appellant in all injunction bills, where the injunction is denied by the Chancellor, to bring on the final hearing of the cause immediately upon the coming in of the appeal.

The motion must be denied.

In this opinion SINNICKSON, PORTER, SCHENCK and SPEER, Judges and CARPENTER, Justice, concurred.

Motion denied.

CITED in *Morgan v. Rose*, 7 C. E. Gr. 594.

COURT OF ERRORS AND APPEALS.

OCTOBER TERM, 1848.

DAVID HALLIDAY, appellant, and PETER A. JOHNSON,
respondent.

A decree in a mortgage case was appealed from; and pending the appeal and within a year from the date of the decree, an agreement, under seal, was made between the parties, that a certain portion of the amount due on the decree should be paid on the execution of the agreement; that the interest on the balance should be paid half yearly, and that instalments of principal should be paid yearly; and that on failure in paying any instalment, the complainant should be at liberty to issue execution on his decree.

Held, that on failure of payment of an instalment, an execution might issue after a year without a *scire facias*.

This case, and the decision of the Chancellor thereupon, is reported *ante*, page 22.

Scofield and *W. Pennington* for the appellant.

Little and *A. Whitehead* for the respondent.

The decree of the Chancellor was affirmed, unanimously.

COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1849.

JOHN GETSINGER *et al.*, appellants, and JONATHAN LORE
et al., respondents.

This case, and the decision of the Chancellor thereupon,
is reported *ante*, page 191.

L. Q. C. Elmer for the appellants.

Wm. Halsted for the respondents.

The Reporter has not been able to obtain any opinion delivered in the Court of Errors and Appeals in this case, and is therefore unable to state on what point or points that court differed from the opinion of the Chancellor.

The decree of the Chancellor was reversed, unanimously.

PETER M. RYERSON, appellant, and JAMES BOORMAN *et al.*,
respondents.

The Chancellor had dissolved an injunction which had been granted at the instance of the complainant in Chancery, who was the appellant in this court, restraining the defendant in Chancery, the respondent in this court, from further proceedings upon an execution issued out of the Court of Chancery. An appeal having been taken, the Chancellor, at the instance of the appellant, made an order restraining the respondent from proceeding upon his execution until the hearing of the appeal or until the order of the Court of Errors and Appeals to the contrary. Upon the coming in of the appeal, a motion was made in behalf of the respondent to be relieved from the effects of this order, and to be permitted to proceed upon the execution. The motion was denied.

The facts of this case are given *ante*, page 167.

F. T. Frelinghuysen for the motion.

B. Williamson and *A. S. Pennington* contra.

The opinion of the court was delivered by the Chief Justice: *nem. con.*

GREEN, C. J. In this case, the Chancellor by his decree dissolved an injunction previously granted at the instance of the appellant, restraining the respondents from further proceedings upon an execution issued out of the Court of Chancery. An appeal having been taken from this decree, the Chancellor, at the instance of the appellants, made an order restraining the respondents from proceeding upon their execution until the hearing of the appeal, or until the order of this court to the contrary. The respondents now, upon the coming in of the appeal, ask to be relieved from the effects of this order, and to be permitted to proceed upon the execution.

The only ground upon which the intervention of the court is asked, is that there are no merits in the appellant's case, and that the appeal is taken merely for the purpose of delay. It is

not averred that the property levied upon is of a perishable nature, that a sale has been, or will be, effected to great advantage, and that the opportunities will be lost by delay, nor that the interests of the respondents will in any way suffer peculiar or irreparable injury. It is averred indeed, that the respondents are delayed in the collection of their debt, but that objection applies equally to every case of contested litigation, and is equally applicable to every order of this court staying proceedings pending an appeal.

It is clear that nothing has been argued upon this motion but the merits of the appeal, and a decision in favor of the motion is necessarily a decision of the merits of the whole case. The inquiry then is, whether this court will, as a matter of practice, thus anticipate the merits of the appeal upon a special motion on the part of the respondents. If this practice is permitted, it is obvious that every case under similar circumstances must be twice heard upon the merits. It is to be argued in the first instance without being upon the paper, without a statement of the case, and that too upon the motion of the respondent, he holding the opening and reply. It is obvious that such a practice will be fraught with serious evils to the despatch of the business of the court, and the due administration of justice.

In *The Sea Insurance Co. v. Ward*, 20 *Wend.* 588, the Court of Errors refused to dissolve or suspend an injunction of the Chancellor restraining the appellants in the exercise of their corporate rights, upon the ground that such order would anticipate a decision upon the merits.

This case is embarrassed by a more serious difficulty. The Chancellor has made an order staying proceedings by the plaintiff in execution, and this court are called upon to set aside that order. There is an obvious and clear distinction between this case and that of an application to this court to grant a temporary injunction where no order has been made by the Chancellor, and for these reasons:

1. The order now applied for cannot be made without investigating and deciding the whole merits of the case; whereas, if the court were called on for an original order, none having been made by the Chancellor, we might either make or refuse the

Ryerson v. Boorman.

order without involving necessarily, in all cases, the merits of the appeal.

2. This order of the court below is under the control of the Chancellor. He may modify or set it aside at his pleasure, and if he sees that equity requires it, we are bound to presume that he will grant the proper relief.

3. The Chancellor, from having heard the whole case, is in a position better qualified to judge of the necessity or expediency of a continuing order than this court can be upon a preliminary motion; and when the Chancellor has made an order not merely staying proceedings till this court meet, but until a final decree or the order of this court to the contrary, we are not disposed to interfere with the exercise of his discretion, except in what appears to us to be a clear case, or upon unquestionable grounds. We surely ought not to interfere with the Chancellor's order when it cannot be done without deciding the merits of the case, and when there is no evidence that any special, peculiar, or irreparable injury will result to the party enjoined by a continuance of the injunction.

The motion to dissolve the temporary injunction granted by the Chancellor must be denied.

CITED in *Jewett v. Dringer*, 2 *Stew.* 200

COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1850.

ENOCH DOUGHTY, appellant, and NATHANIEL DOUGHTY, respondent.

On a question of capacity, the mere expression of an opinion by a witness, not founded on any facts stated by him from which the court may judge of the soundness of the opinion expressed, if it be any evidence at all, is the lightest possible evidence.

That the complainant, before the making of the contract, had had a severe attack of illness, from which time he was a less active, enterprising business man than before ; that he was a man of intemperate habits ; that he was subject to occasional fits, arising from the habits of intoxication ; that his mind was less vigorous than when his habits were correct, does not show that he was deprived of his right reason, or incapable of managing his affairs or business.

The bill stated that, at the time of the making of the partition sought to be avoided, the complainant was deprived of his right reason, and was of unsound mind and totally incapable of transacting any business or of the government of himself and management of his affairs, and stated what the partition was.

Held, that under this bill the court could not decree for the complainant and set aside the contract upon evidence of imbecility of mind and the ground that the partition was so unequal as, joined with the incapacity of the complainant, to raise a presumption of fraud in the defendant in procuring the deed of partition.

Under what circumstances the lapse of twelve years will be a ground on which a court of equity may refuse to interfere to set aside a partition deed alleged to have been obtained by the defendant from the complainant when he was of unsound mind.

For the facts of this case see *ante*, page 227.

Wilson and *P. D. Vroom* for the appellant.

Jeffers and *Browning* for the respondent.

The opinion of the court was delivered by the Chief Justice.

GREEN, C. J. The bill charges that on or about the 6th of February, 1819, the complainant and defendant entered into a general partnership in trade and business, including the buying and selling of real estate, dealing in lumber, wood and charcoal, building and sailing vessels, and farming; that each partner put in an equal amount of capital, and were to share equal in profits and loss; and that the partnership, as the complainant believes, continued down to the time of the filing of the bill of complaint, 2d December, 1851. That during the continuance of the partnership the partners became seized of divers tracts and parcels of real estate, and possessed of personal property of various kinds. That from the commencement of the partnership the defendant has been in the habit of applying the money and property of the partnership to his own private use, and had not kept full and regular accounts.

The bill further charges, that about the 1st of June, 1832, the complainant was taken sick, and continued so for a considerable time. That during the latter part of June, 1833, and the month of July following, the complainant was deprived of his right reason, and was of unsound mind and wholly incapable of the transaction of any business, or of the government of himself and management of his affairs, and that he continued in this position up to the 1st of January, 1834.

That on his restoration to reason in January, 1834, the complainant found to his surprise that the defendant had possessed himself of *all* the personal property of the partnership, and was informed by the defendant that he had executed a bill of sale to the defendant for all his interest in the personal property of the partnership, and also a deed for the complainant's interest in certain real estate of the firm particularly described in the bill. That the complainant never received any consideration for the conveyance of the real or personal estate, and that he continued to occupy the same, notwithstanding the conveyance of his interest, up to July, 1844, pursuant to the terms of the partnership.

1. The bill prays an *account* of the partnership transactions.

2. That the *deed* and *bill of sale* may be declared fraudulent and void.

3. An injunction to restrain the collection of the partnership debts, and the use by the defendant of the real estate.
4. A receiver to collect and receive the debts.

The answer admits the existence of a partnership prior to July, 1833, but alleges that on the 2d of July a dissolution of the partnership was agreed upon, and that on the 6th of July an instrument of dissolution, dated on the 2d, was executed. That on the 4th of July deeds were exchanged between the parties conveying part of the real estate to complainant and part to the defendant. That bills of sale for the vessels were made, and that the other personal property of the firm was taken by the different partners, and that both the real and personal estate have since been held in severalty. It expressly denies the insanity or incapacity of the complainant at the time of the execution of the papers, and all fraud in the transaction.

The issue made by the pleadings is whether, at the time of the transaction sought to be avoided, the complainant was deprived of his right reason; whether he was of unsound mind, wholly incapable of the government of himself and the management of the affairs; and whether the contract sought to be avoided was made with him while in that condition, fraudulently and without consideration. This is the case made by the bill and denied in the answer.

Upon this issue we think the complainant has signally failed in supporting his case. A number of witnesses do testify that in their opinion the complainant was incompetent for the transaction of business at and about the time of making the contract. It is, however, with few and slight exceptions, the mere expression of opinion, not founded upon any facts stated by the witness from which the court may judge of the soundness of the opinion expressed.

Now it is a well settled and most salutary rule, that upon a question of capacity the mere opinion of witnesses, if it be evidence at all, is the lightest possible evidence. The rule has been long established and repeatedly recognized.

The few facts stated and relied upon by the witnesses, in

support of their opinions, are mainly such as may be satisfactorily accounted for by the delirium of fever or the madness of temporary intoxication. And this appears to be the view of his situation entertained by his family physician. He declares that the complainant was a sensible man, when well, and as capable of transacting business as ordinary men. His fits were caused by excess. It is clearly shown that in 1828 the complainant had a severe attack of illness, from which time he was a less active, enterprising business man than before; that he was a man of intemperate habits; that he was subject to occasional fits, arising from his habits of intoxication; that his mind was less vigorous than while his habits were correct. But all this does by no means show that he was deprived of his right reason or incapable of managing his affairs and business.

If there were no evidence on the part of the defense, if the case stood upon the complainant's evidence alone, there is not evidence, in my judgment, upon which any jury would be justified in depriving him of the management of himself and his affairs. But if the evidence on the part of the defendant is considered, no doubt can remain upon the question of the defendant's incompetency. It is shown, and not denied, that the making of the agreement and the execution of the contract extended through a period of at least five days, from the 2d to the 6th of July, inclusive. That on the 2d, the complainant went to defendant's house in relation to the contract, and left part of his title papers there. That on the 4th of July he accompanied the defendant to the office of Mr. Canfield, (a public officer) a Collector of the U. S. revenue for the District of Great Egg Harbor, who drew the bills of sale of the vessels, and certified their execution and the execution of the deeds of the real estate; thence to the commissioner for taking the acknowledgment and proof of deeds, where the deeds were acknowledged. On the 6th of July other instruments dissolving the partnership and completing the transactions were executed in the complainant's own house, in the presence of his family, and witnessed by a member of his family and a person in his employ. It is remarked, moreover, that on the 4th of July the defendant left his home in the pres-

ence of his family, with the knowledge of his wife, of persons in his employ, and several friends of the family then on a visit at his house. These circumstances would seem to show that at the time of the transaction he could not have been a lunatic or of unsound mind, in the judgment of his family or friends, or of the public officers who were cognizant of and participated in the transaction. It is further shown, on the part of the defendant, that during the year 1833 and during the very period when the bill alleges and the witnesses testify that the complainant was of unsound mind and incapable of managing his affairs, he attended to his ordinary affairs and business. He employed workmen, he superintended them, he discharged them, he settled with them; he bought; he sold; he erected houses. He did in fact all the business which his situation and business in life required him to attend to. Under such circumstances, to avoid solemn engagements on the ground of incapacity would be unwarranted and does not seem to be gravely insisted upon.

The case made by the evidence and relied upon in argument is that the partnership previously existing between the parties was dissolved in 1833, and that the partnership property was then divided between them. That the complainant was a man of weak mind, and that the partition was so unequal as, joined with the incapacity of complainant, to raise a presumption of fraud on the part of the defendant, and to require that the contract should be avoided. Admitting the fact to be apparent that the division of the partnership property between the partners was unequal, is it competent for the court to give the relief asked for upon the frame of this bill? The bill charges the continued existence of a partnership, and it is silent as to any dissolution or partition of the property. It sets up utter insanity, and alleges that the deeds were fraudulently obtained without consideration. The answer shows that the deeds were executed upon a dissolution of partnership in 1833, and pursuant to the terms of dissolution. It is now sought to avoid the deeds upon the ground that the inequality of the partition was so great as to raise a presumption of fraud on the part of the defendant. But this ground is not alluded to in the

bill. It is a ground which the defendant has had no opportunity to answer, and upon which no testimony has been taken. Under such circumstances, can a decree proceed upon this ground? It is not a mere technical or formal objection; but it affects materially and directly the substantial rights of the defendant. By the well settled principle of a court of equity, the complainant is entitled to the defendant's answer under oath to every material allegation of the bill. The defendant is equally entitled to the benefit of his answer upon every material point involved in the controversy. Now if this decree is sustained, it can be sustained only upon a ground upon which this defendant has had no opportunity of answering, or at least upon which he has never been called to answer. The bill, it must be remembered, charges that the partnership still existed; that no dissolution had taken place; that the deeds were utterly without consideration and while the defendant was deprived of his reason. The answer denies the insanity, avers that the partnership was dissolved, and that deed was executed pursuant to the terms of dissolution. Now this answer is pertinent, relevant and material. But would it have been either material or pertinent for the defendant by his answer to have gone further, set out the terms and conditions of the partnership and the *equity* of the dissolution? It would certainly have been justifying an act in no wise impeached, and might have created suspicion where none had existed. The radical objection to this decree upon the bill as framed is not that a total insanity is charged and a partial insanity proved, nor that a total want of consideration is charged and a partial one attempted to be shown. But the objection is, that the decree is made to rest upon a ground not alluded to in the bill, and upon which the defendant has had no opportunity of answering. Not only so, but it is a point upon which no testimony has been taken, and upon which, if the court act, they must act upon conjecture or surmise, and not upon a full or complete view of the situation of the parties, and the mere justice and merits of the case. Admitting for the sake of the argument that this partition between the partners was unequal, it does not follow that it was utterly inequitable or unjust as between themselves. Admitting

the partnership to have been equal; that as to the world they were the equal owners of all the partnership property, as well as of the real and of the personal estate; if one of the partners have made large advances to the firm, he is to be paid before the partnership property is divided. The partnership property is only the clear estate after all the debts of the firm are paid. It is immaterial whether the debt is due to a partner or a stranger. And if one of the partners is largely in advance to the firm, or if the firm is largely in debt, and one partner, upon the dissolution, assumes the debts of the firm, such partner must necessarily take the largest portion of the partnership property, or the partition would neither be just nor equitable. Now it is unnecessary to assume that such circumstances did exist between these parties as to render an unequal partition of the property equitable and just, or to rely upon the improbabilities of each partner having advanced a dollar more than the other. It is enough to say that the court knows nothing judicially on the subject, and are not in a position to decide the question with safety or in accordance with the settled principle of equity. It is a question not raised by the bill, nor met by the answer, nor settled by the evidence. Upon this ground alone the party can not have the relief he seeks upon the frame of the present bill.

This objection applies to the form of the remedy. There is another objection fatal to the relief sought in whatever form the case may be presented.

The contract was made and the instruments sought to be avoided were executed in July, 1833. (The bill was filed in December, 1845.) In January, 1834, the complainant recovered (according to his own statement) the use of his reason. The bill was filed in December, 1845. During the period of nearly twelve years before the filing of the bill, the complainant was of sound mind. He had full knowledge of all the circumstances of the alleged fraud. There was no impediment, legal or otherwise to his seeking relief. He was not prevented by absence or poverty from maintaining his rights. Under such circumstances it should require the most cogent considerations to justify the delay and warrant a court of equity in lending its aid to the

complainant. The delay of the complainant might operate as a greater fraud than any imputed to the defendant. But the objection to the relief sought does not rest upon the mere lapse of time. The complainant not only acquiesced in the claim of the defendant, but he did numerous acts unequivocally affirming the validity of the transaction. He took possession of all the personal property which upon the dissolution, was assigned to him, and converted it to his own use. Two years after the conveyance he placed his deed upon record. He held the land conveyed to him in severalty, and treated it as his own. He had it surveyed; he cut off the timber; he erected buildings upon it; he received and appropriated the rents and profits; he sold and conveyed in fee a part of the land with covenants of general warranty, and with a recital that his title was derived from the defendant. These acts extend through a series of years, while the defendant was in his right mind. His exclusive title to the property grew out of the very transaction which he now seeks to set aside as fraudulent. Sound policy, the dictates of common justice, no less than the firm principles of equity forbid that a man should be permitted to repudiate a contract which he has thus repeatedly affirmed. Nothing, says the Chancellor, can call a court of equity into activity, but conscience, good faith and a reasonable diligence. It is *not* conscientious for a party to stand by and permit his adversary to make permanent improvements on property to which *he* claims title. It is not *good* faith for a party to repudiate a contract the benefits of which he has availed himself of, and which by repeated acts he has unequivocally affirmed. It is not reasonable diligence for the party, when there is no disability and no impediments to the vindication of his rights, to lie passive for twelve years, and call upon a court of equity for its aid, when the lapse of time and his own laches may have deprived his adversary of the means of defense. The decree of the Chancellor must be reversed and the complainant's bill dismissed with costs in the court below, but not in this court, and the record remitted to the Court of Chancery to be proceeded in accordingly. In this opinion the whole court concurred. Decree reversed.

COURT OF ERRORS AND APPEALS.

APRIL TERM, 1850.

Executors of SAMUEL W. HALL, appellants, and Executors
of GERSHOM LAMBERT, respondents.

A mortgage was executed in blank, the sum which it was designed to secure not appearing either on the mortgage or the registry ; but the proviso thereof stated that it was to be void on the payment of (blank) agreeably to the condition of a bond given by the mortgagor to the mortgagee, of even date with the mortgage, and payable at a day specified. The bond contained the sum.

Held, that the mortgage was good against a subsequent mortgagee.

A. gave to B. a bond and a mortgage to secure the payment thereof ; and subsequently gave to C. a mortgage on the same land. Afterwards D., an uncle of A., paid, or handed to B., two several sums of money at two different times, taking loose receipts therefor on account of the said bond held by B., and afterwards a further sum as the balance in full on the said bond ; and when the last of said sums was so paid or handed to B., the three sums were credited on the bond, the first two on account of the bond, and the last as the balance in full on the said bond ; and D. took no assignment of the said bond and mortgage given to B., or of either of them.

Held, under the proofs of the case, that the said bond and mortgage, in the hands of D., were subsisting incumbrances as against the mortgage held by C.

For the facts of the case see *ante*, 410.

P. D. Vroom for the appellants.

J. H. Wakefield and *A. Wurts* for the respondents.

The opinion of the court was delivered by the Chief Justice.

GREEN, C. J. The controversy in this cause is a question of priority between two mortgagees, each holding a mortgage upon the same premises.

The appellant's mortgage is prior, both in date and registry, but several reasons are assigned why this priority has ceased to exist. It is insisted that it is not a valid mortgage, because it was executed in blank, and the sum which it was designed to secure does not appear either upon the mortgage or registry. The mortgage is clearly a valid operative instrument as between the parties. The mortgage could not be prejudiced in a Court of Equity by the accidental omission to insert in the mortgage the sum for which the bond was given. The mortgage is redeemable upon the payment of a sum of money agreeably to the condition of a bond given by the mortgagor to the mortgagee, of even date with the mortgage, and payable at a day specified. There is no room for question as to the identity of the bond. The blank in the bond was filled. The amount for which the mortgage was given could readily be ascertained by recurrence to the bond. It is unnecessary to decide what the effect of the registry of a mortgage in blank would be, as evidence of *presumptive* notice, because there is in this case indubitable proof of *actual* notice of the existence of the mortgage to the agent of Lambert, the subsequent mortgagee. He saw the record in the Clerk's office, and was expressly informed of the amount which the mortgage was intended to secure. Nor can the question fairly arise as to the effect of a conflict respecting the amount of the mortgage between the actual notice and the presumptive notice by the registry. If the registry be available at all as a constructive notice, it can only be for the amount of the mortgage as it really exists. If not notice of this fact, it is not notice at all, and the case stands upon clear proof of actual notice of the real amount secured by the mortgage. The only remaining question is, whether the mortgage was paid and satisfied, or is still a subsisting encumbrance. The mortgage was originally given on the 1st of May, 1841, to Hugh B. Ely, administrator of John Wilson. It was the first mortgage on the premises, and was given to secure a part of the purchase money. The amount due on the mortgage was subsequently paid in three several payments, not by the mortgagor, but by Samuel W. Hall, the appellant. Receipts for these payments are indorsed on the bond; the first two payments purporting to

be on account of the bond, and the last purporting to be the balance in full on the bond. The bond and mortgage were not assigned either by parol or in writing. But they were delivered uncanceled to Hall, who had made the payments, and have been retained by him uncanceled, as he insists for his security; the mortgage remaining uncanceled of record. There is no proof either of a request to assign, or of an agreement to assign the bond and mortgage. The parol proof amounts to this; that the amount due on the bond and mortgage was advanced by the appellant, at the request of the mortgagor who had made application to him for a loan of money for that purpose, and that the mortgagee who received the money, understood that it was the intention of the party paying the money not to extinguish the mortgage, but to stand in the place of the mortgagee.

In the present case there is no pretense of fraud attempted or meditated. The circumstances excluded all pretense of fraud. When Lambert's mortgage was recorded, the prior mortgage of Hall was standing in full force, no payment had been made upon it. The payments were all made, not only after Lambert's mortgage had been recorded, but at a time when the mortgagor's property was heavily incumbered by judgments at law. It seems the obvious dictate of justice and equity, that where a third party advances his money in good faith, at the request and for the benefit of the mortgagor, in satisfaction of the mortgage debt, and holds the bond and mortgage in his possession uncanceled, he should be permitted to stand in the shoes of the mortgagee, and to have the protection of the mortgage security, although there be no assignment of the security, or even though the mortgagee should absolutely refuse to assign. It has been the constant policy of a Court of Equity to treat the mortgage either as canceled or outstanding, as shall best promote the ends of justice, and the actual and just intention of the parties. *Starr v. Ellis*, 6 *John. Chan. R.* 395; *Neville v. Demeritt*, 1 *Green's Chan. R.* 336.

I am of opinion that the mortgage executed by William Hall and wife to Hugh B. Ely, administrator of Wilson, and by him assigned to the appellant, is a valid and subsisting lien and

incumbrance upon the premises therein described, and is entitled to priority over the mortgage of the respondent.

The decree of the Chancellor should be reversed, and the record remitted to be proceeded in agreeably to law, and the opinion of this court.

In this opinion the court concurred, except Risley, Judge, who dissented.

Decree reversed.

ROBERT R. FREEMAN *et al.*, appellants, and PETER Z. ELMENDORF, respondent.

This case is reported *ante*, page 475.

F. B. Chetwood for the appellants.

Blauvelt for the respondent.

The opinion of the court was delivered by the Chief Justice.

GREEN, C. J. 1. The appeal is from an order of the Chancellor dissolving an injunction. The object of the injunction was to restrain the defendant from selling the real estate of the complainants by virtue of an execution upon a judgment at law against Matthew F. Freeman, the father of one of the complainants, and the grandfather of the others. The case made by the bill is, that the land in question was conveyed by Freeman, the defendant in execution, to the complainants before the recovery of the judgment; that through the ignorance of the grantees the deeds were not recorded till after the recovery of the judgment, but that the plaintiff in execution is charged with constructive notice of the conveyance.

2. That the judgment was originally a lien upon other real estate of Matthew F. Freeman, owned by him after the sale and conveyance to the complainants, and that upon principles of equity a party having a lien on two parcels of real estate is bound to resort for satisfaction, first to that parcel the title to which remains in the debtor.

3. That the debt for which the judgment was recovered was secured by a mortgage given by John I. Gaston, as a collateral security for the payment of the debt. That the security of the mortgage was lost by the laches of the creditors, and that therefore he is not entitled in equity to enforce the payment, either

against the original debtor, or to hold it as a lien upon property in the hands of his grantees.

The decisive answer to the last ground of relief is, that Freeman, the defendant in execution, does not occupy the position of a surety. The debt was his own. The mortgage, though given by Gaston, was upon property held by him in trust for Freeman and his co-debtors. It was, in fact, a mortgage given by Freeman, through his trustee, upon his own land, to secure his own debt. The answer moreover is express and direct, that the mortgage security was not lost by the laches of the creditors, but that it was not recorded at the instance and by the request of the mortgagor, the trustee and agent of the debtor.

In regard to the second ground of relief, to wit.: that the purchaser is entitled to have the other real estate levied on sold first, or to contribution from the owners of that land. It is a matter of serious doubt whether the principle affects the right of a judgment creditor. No such case was cited upon the argument, and in the short space allowed for examination I have found none. The bill is not framed at all with a view to that species of relief. These two grounds of equitable relief being disposed of, the case made by the bill, and the case mainly relied upon in argument is, that the sheriff, upon an execution against Freeman, is about to sell the lands of the complainants, and a perpetual injunction is asked to restrain such sale. The questions involved in the controversy are, whether the deed from the defendant, or even to the complainant, was or was not fraudulent, and if it was not, then whether the defendant is chargeable with constructive notice of the deed. Both these are purely legal questions, and properly triable in a court of law. If the legal title is in the complainants, the sale by the sheriff will not prejudice their rights. The purchaser must resort to an action at law to recover possession, when the legal questions can be tried and decided. It was suggested with truth upon the argument, that permitting the sale to be made under the execution will subject the complainants to the necessity of paying the execution, or subject them to the hazard of having the land sacrificed to a purchaser willing to speculate upon the hazard of a lawsuit. It may be

further suggested that if the purchaser should be unwilling to bring an ejectment, the effect of a sale would be to cast a cloud upon the title of the complainants.

But it is obvious that the same objections exist in every case where the sheriff, upon an execution against one, should attempt to sell land, the title to which is claimed by another. And yet in such case equity ordinarily will not interfere, and for manifest reasons. In truth, a Court of Equity has no jurisdiction where the whole question involved is a question of legal title. If the sheriff is enjoined from selling under the execution, there is no mode in which the question of title could be tried at law. A Court of Equity must make the injunction perpetual, and to that end must necessarily try and decide the legal title.

The order of the Chancellor must be affirmed.

Per totcur. The order of the Chancellor was affirmed.

COURT OF ERRORS AND APPEALS.

NOVEMBER TERM, 1851.

Executors of MARGARET S. RUTGERS, appellants, and JOSEPH KINGSLAND, respondent.

This case is reported ante, page 178.

A. C. M. Pennington and *W. Pennington* for the appellants.

R. Van Arsdale and *A. Whitehead* for the respondents.

The opinion of the court was delivered by the Chief Justice.

GREEN, C. J. The court are of opinion,

1. That there is satisfactory evidence of a mistake in the description of the premises contained in the mortgage of September, 1836, from Brown to Pomeroy, and that the mortgagee or his assignee was entitled in equity to have the mortgage reformed as against the mortgagor, or those claiming under him with notice.

2. That there is satisfactory evidence of notice to Charles Mix, the purchaser of Brown's title at the master's sale, and that *as against him* the complainant would be entitled to have the mortgage reformed.

3. That under the law of this State the registry of a mortgage is notice only of what is contained in the registry, and that an erroneous mortgage duly registered cannot be reformed as against a judgment creditor without notice.

4. A majority of the court are of opinion that William Mix

and Joseph Kingsland are judgment creditors without notice, and that as against them, or a purchaser claiming by virtue of their judgments, the mortgage cannot be reformed.

A large minority of the court are of opinion that the recitals in the deed from the master to Charles Mix and the proceedings in the cause by virtue of which that deed was executed are constructive notice, not only to Charles Mix, but to all persons claiming under him either as *bona fide* purchasers or judgment creditors; that consequently both the judgment creditors and the purchaser are affected with notice.

5. The court are further of opinion, that after a decree of foreclosure and sale of the mortgaged premises as actually described, the mortgage cannot be reformed and a sale made of an additional quantity of land alleged to have been omitted in the description contained in the mortgage. And inasmuch as it appears by the admission of counsel, that the premises sold under the original decree have been conveyed by the sheriff to the complainant, and by the complainant to a third party, the original decree of foreclosure cannot be opened, nor can the complainant have the relief prayed for in her bill. And upon this ground the court are of opinion that the decree of the Chancellor must be affirmed, *with costs*.

In this opinion Carpenter, Randolph and Ogden, Justices, and Risley, Porter, Wills, Schenck and Cornelison, Judges concurred.

Nevius, Justice, and Valentine, Judge, dissented.

Decree affirmed.

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AGREEMENT.

1. On the question of the mental capacity of a party to make a division with his co-partner and co-tenant of a large personal and real estate, the unconscionable character of the division will be considered

in aid of the proof of incompetency. It is not necessary that a party should have been absolutely *non compos* to entitle him to relief in such a case. *Doughty v. Doughty.* 227.

2. One of the parties to deeds dividing a large personal and real estate between them had been, by long intemperance and severe sicknesses, producing frequent convulsions, reduced to a very low state of weakness of body and imbecility of mind. The other party was his elder brother, who had long been a partner in business with him, and thus in a relation to exercise great influence over him; and the bargain was such as no honest or fair man would think of proposing or ought to be willing to accept. The deeds were declared to be fraudulent and void. *Ib.*
3. Relief in such cases does not depend on the question whether the precise degree of imbecility charged in the bill is proved. Imbecility calling for relief under the circumstances may be proved, and acted upon by the court, though it be not the degree of imbecility charged. *Ib.*
4. A. B. C. and others were constituted a body corporate, with a certain capital to be divided into shares, and authorized to construct a railroad or McAdamized road. A loan becoming necessary to complete the road, it was resolved, at a meeting of the Directors and stockholders, that the Company should borrow a certain sum. The money could not be borrowed on the credit of the Company, and A., B. and C. borrowed the money on their own individual credit, and advanced it as a loan to the company; and the Company, to secure the re-payment thereof, with interest, executed to

A., B. and C. an obligation conditioned for the payment of said sum in five years, with interest semi-annually, and a mortgage of all the lands contained within the bounds of their road as located, graded, &c., and all the materials of which said road was constructed, and the appendages thereof, and all dividends, proceeds and profits which might thereafter be declared or accrue from the use of the road. And the Company, by a clause in the mortgage, covenanted, that the proceeds and profits arising from the road should be applied, in the first place, at the end of each half year from the date of the mortgage, to the payment of the half year's interest. And in order to indemnify A., B. and C. against more than their proportionate part of any loss that might accrue by reason of any insufficiency of the mortgaged property to pay the sum so loaned, certain other stockholders of the Company, together with A., B. and C., entered into an agreement under seal by which the said other stockholders agreed with A., B. and C. that if the mortgaged property should be insufficient to pay the said sum and interest, so that any loss or deficiency should happen, each of them and each of the said A., B. and C. should bear an equal portion of such loss or deficiency; and that if any of them should, before or at the time such loss or deficiency should be ascertained, become or be unable to pay his proportionate share thereof, then such of them as should remain solvent and able should sustain such loss equally with the said A., B. and C. And they further covenanted and agreed, to and with the said A., B. and C., that if the mortgaged property should prove insufficient to pay said sum and interest, so that a loss or deficiency should happen, then they, their executors, &c., would forthwith pay such sum to A., B. and C., their executors, &c., as would divide said loss or deficiency between such of them as remain solvent at the time such loss or deficiency should be ascertained, and that the said A., B. and C., severally, should bear an equal part of such loss.

The mortgage becoming payable and remaining unpaid, A., B. and C. filed their foreclosure bill, and obtained a decree for the sale of the mortgaged property; and it was sold by the Sheriff. The amount of the sales was insufficient to pay the mortgage; and the amount of the deficiency was ascertained by and on the day of the sale.

A., B. and C. filed their bill, charging that certain of the parties to the said agreement (naming them)

were, at the time when such deficiency was ascertained, unable to pay their respective portions thereof; and that certain other parties to the said agreement (naming them) remained and were solvent and able to pay their respective proportions of such deficiency, and were the only parties to the said agreement, other than the complainants, that remained and were solvent and able as aforesaid; and these last named persons only were made defendants in the bill.

The bill prayed that the defendants might discover whether they were solvent and able to pay their respective proportions of the deficiency, or any part and how much of their said proportions; and that they might be decreed to bear the said loss and deficiency equally with the complainants; and that if it should appear by the said discovery, or otherwise, that at the time when said deficiency was ascertained any or either of the defendants was unable to pay his proportion, then, that such of the defendants as then were solvent and able might be decreed to pay to the complainants their respective proportions of the deficiency.

The construction of the agreement was held to be, that the loss which should accrue, either from the deficiency of the mortgaged premises or from inability in any of the parties to the agreement to pay their full proportion of the deficiency, should be borne equally by such of the parties to the agreement as should be able to bear an equal proportion of such loss with each of the complainants; and that, therefore, all the parties to the agreement, other than the complainants, should have been made parties defendants in the bill. *Black v. Shreeve*, 440

Held, that the complexity of the said agreement and the multiplicity of suits it might give rise to at law were grounds on which a court of equity might entertain a bill for the adjustment of the contribution called for by the agreement in one suit, *Ib.*

One of the subscribers to the said agreement had died, after the amount of the deficiency was ascertained, leaving a will, of which C., D. and E. were appointed executors. C., in his individual capacity, was a complainant in the bill, and D. and E., the other two of the said executors, were made defendants as such executors.

Held, that it was not necessary that C. should be made a defendant as one of the said executors. *Ib.*

Held, that the terms of the said mort-

gage required a sale under it of whatever could be sold under it; and that such sale and the proceeds of it fixed the amount of the deficiency. *Id.*

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1. A. having contracted to buy a lot of land from B., and there being judgments against A., it was agreed between them that B. should make the deed to a brother of A., in trust for an infant son of A., the brother and son having no knowledge of the transaction at the time; and that the deed should not be recorded; and that when A. should settle with his creditors, B. should make a deed to A. A. paid the money for the lot, and B., afterwards, in the absence of A. from the State, made the deed to the brother in trust, &c., and had it recorded. Subsequently, C. applied to A., who was in possession of the lot, for the purchase of it, and A. agreed to sell it, and to procure a deed from the brother to C. C. requested A. to show him the title papers, but the deed to the brother could not be found, or was not produced. C. then applied to the Clerk of the County for a certificate of the title as it appeared on the records; and the Clerk's certificate, by mistake, gave the deed from A. to the

brother as an absolute deed, unlimited by any trust ; whereupon C. took a deed from the brother and paid the purchase money. C. had no notice of the trust other than the constructive notice by the record. *Held*, that C.'s title was good. *Newark Aqueduct Company v. Joralemon*, 304

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1. A bill had been filed against "The Trenton Delaware Falls Company" on the ground of insolvency, on which receivers had been appointed, and a sale made, by the receivers, of all the real estate of the company, free from all incumbrances. The proceeds were ordered to be paid in discharge of incumbrances, according to the priority thereof. The Trenton Bank held mortgages on all the real estate of the company. The Falls Company, after giving the mortgages to the Bank, and before the filing of the said bill, sold a part of their real estate, all of which was so mortgaged to the Bank, to B. and H. The Bank bought at the receiver's sale all the real estate then held by the Falls Company ; and received from the proceeds of the sale the full amount of their incumbrances ; and the proceeds of the sale were not sufficient to pay P. T. S. the amount of a judgment obtained by him subsequent to the mortgage held by the Bank, and subsequent to the sale by the Falls Company of a part of their real estate to B. and H. P. T. S. filed a bill against B. and H., to compel them to contribute towards the payment of his judgment so much as would have been a just proportion of the amount of the mortgages held by the Bank to be paid out of the lands so sold to B. and H., and which were covered by the mortgages to the Bank. After the filing of this bill, and after answer and replication filed and evidence taken, P. T. S. caused an execution to be issued on his judgment, and caused a sale to be made by the Sheriff of all the real estate of the Falls Company which had been so sold by the receivers ; under the idea entertained by his counsel that the said sale by the receivers was void. At this sale the Bank bid a sum sufficient for the payment of the judgment of P. T.

S., and the Sheriff struck off the property to the Bank, and gave the Bank his Sheriff's deed for it ; and the judgment of P. T. S. was paid with the money received by the Sheriff from the Bank on this sale. A motion was then made, on behalf of B. and H., that the said bill of P. T. S. be dismissed with costs. The court dismissed the bill without costs. *Smith v. Brown*, 526

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COURT OF ERRORS AND APPEALS. PRACTICE.

1. On appeal from an order dissolving an injunction, the Chancellor granted an order staying the proceeding to restrain which the injunction had issued until the next sitting of the Court of Errors and Appeals. A motion was made in that court, at its next sitting, for an order extending the stay until the hearing on the appeal. *Held*, that the Court of Errors and Appeals had power to make such an order ; but that the granting or refusing it rested in the sound discretion of the court. It was denied in this case. *Doughty v. Somerville and Easton R. R. Co*, 631
2. The Chancellor had dissolved an injunction which had been granted at the instance of the complainant in Chancery, who was the appellant in this court, restraining the defendant in Chancery, the respondent in this court, from further proceedings upon an execution issued out of the Court of Chancery. An appeal having been taken, the Chancellor, at the instance of the appellant, made an order restraining the respondent from proceeding upon his execution until the hearing of the appeal or the order of the Court of Errors and Appeals to the contrary. Upon the coming in of the appeal, a motion was made in behalf of the respondent to be relieved from the effects of this order, and to be permitted to proceed upon the execution. The motion was denied. *Ryerson v. Boorman*, 540

CREDITOR'S BILL.

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1. The will gave to T. R. what might be realized and received on a certain bond and mortgage, describing it, which the testator, at the time of making the will, held against H. B. After the making of the will, the testator, in his lifetime, received a deed for the mortgaged premises in full satisfaction of the bond and mortgage. *Held*, that the will operated as a devise in fee of the mortgaged premises. *Executor of Baldwin v. Baldwin*, 311.

2. A devise of a lot of land to A., in trust, as the site for a building for a free school for the benefit of all poor children within a certain district in a city, and a lecture-room for religious worship, and of another lot of land as a site for a dwelling-house, to be occupied by the minister that may from time to time officiate in the said room, the said lecture-room to be for the use of the denomination of Christians called Methodist Episcopal, and a bequest of \$1,200 towards the said building, are good. *Id.*

3. A. devised real estate to his widow for life, and ordered it to be sold after her death, and the proceeds to be equally divided among the children of his brothers and sisters. A. had three brothers and a sister. Two of his nephews and one of his nieces had died before the making of the will, leaving issue. *Held*, that such issue were not entitled to any share.

One of the nieces died after the testator's death, and in the lifetime of the widow. *Held*, that she had a devisable interest. *Van Gieson v. Howard*, 462.

DISCOVERY.

1. A bill was filed by one heir at law, against another heir at law, who was also administrator of the personal estate of the intestate, for the discovery of deeds; one, made by the intestate, in his lifetime, and his wife, the mother of the parties, of property belonging to the wife, to A. B.; the other, a deed from A. B. to the intestate, in his lifetime; neither of which had been recorded. The bill stated that, after the death of the intestate, the defendant had by fraud and circumvention procured a will to be made by the mother, giving the property to

him; and prayed a discovery of the deeds; and also prayed the relief that the deeds might be established; and that the defendant may be directed to account for the complainant's portion of the rents and profits. The answer discovered the deeds, but set up facts on which it claimed that they were inoperative; and denied that the will made by the mother was procured by fraud. On the pleadings and proofs it was ordered, that the bill be retained for twelve months, and the complainant be at liberty to bring an ejectment; and that the defendant produce the deeds on the trial thereof; reserving all further directions. *Tomlinson v. Sheppard*, 80.

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1. On a question of capacity, the mere expression of an opinion by a witness, not founded on any facts stated by him from which the Court may judge of the soundness of the opinion expressed, if it be any evidence at all, is the lightest possible evidence. *Doughty v. Doughty*, 643.

Vide INCAPACITY, MENTAL, 1, 2. MORTGAGE, 5.

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1. A decree in a mortgage case was appealed from; and pending the appeal, and within a year from the date of the decree, an agreement, under seal, was made between the parties, that a certain portion of the amount due on the decree should be paid half yearly, and that instalments of principal should be paid on the execution of the agreement; that the interest on the balance should be paid yearly, and that instalments of principal should be paid yearly; and that on failure in paying any instalment, the complainant should

be at liberty to issue execution on his decree. *Held*, that on failure of payment of an instalment, an execution might issue after a year without *scire facias*. *Halliday v. Johnson*, 22.

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EXECUTORS AND ADMINISTRATORS.

1. Insolvency is not a sufficient reason for taking the administration of an estate out of the hands of executors.

Facts insufficient to authorize it to be done. *Schenck v. Ex'rs of Schenck*, 140

2. No higher duty rests on a Court of Equity than that of insisting on a plain, direct and faithful performance of the trust reposed in executors. *Pennington v. Ex'rs of Fowler*, 343

3. The Orphans' Court opened the accounts of executors on an allegation of fraud or mistake, and determined that a certain sum, \$2,000, did not belong to the estate, and should not have been brought into the account by the executors, and struck it out, and also struck out a portion of the commission. On appeal to the Prerogative Court, the decree of the Orphans' Court striking out the \$2,000 was reversed. *Held*, that the commissions struck out might be restored. *Adm'r of Stevenson v. Ex'rs of Hart*, 471

4. Executors, in several partial accounts which had been exhibited to the Orphan's Court, had accounted separately; and no objection had been made to that mode of accounting, nor any effort to make the executors answerable jointly; and there was no evidence that either of the separate accountants ever agreed to become liable for what had been received by either of the others; nor evidence that the executors assumed the uncollected securities and agreed to account to the residuary legatees for the amount of them.

Held, that the executors were not jointly responsible. *Merselis v. Ex'rs of Merselis*, 557

5. Partial accounts of executors exhibited to and allowed by the Orphans' Court will not prevent a

person interested in the estate from bringing the executors into this Court for a final settlement. *Ib.*

6. As long as the estate is not finally settled, this Court may direct a statement of the whole account from the beginning, and take its own measures to compel the payment of the moneys found in the hands of the executors by a final account in this Court, notwithstanding the Orphans' Court, on partial accounts, directed the distribution of the balances thereby found to be in the hands of the executors. *Ib.*

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Vide INJUNCTION, 1.

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1. A. bought of B. a mill seat, with a saw mill thereon, driven by water power and paid part of the purchase money, and gave B. a mortgage on the premises for the residue of the purchase money. A. converted the building, by alterations and additions, into paper mills, putting in the machinery proper for that purpose, and a new water wheel; the mills being made complete as mills to be driven by the water power on the premises. It appearing, after several years, that in unusually dry seasons the water was not sufficient to drive the mills all the time, A. placed a steam engine in the cellar of one of the buildings, and applied the power of the engine directly to the driving wheel, so that the machinery of the mill moved precisely as if the wheel was turned by the water. *Held*, that the engine did not become subject to the mortgage; but might be removed from the premises. *Randolph v. Gwynne*, 88.

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Vide FRAUDULENT CONVEYANCE, 1. FRAUDS BY INCORPORATED COMPANIES, 1. INJUNCTION, 7.

FRAUDULENT CONVEYANCE.

1. The statute entitled "An act respecting the Court of Chancery," Rev. Stat. 921, providing that on the return "no goods," on an execution issued on a judgment at law, a bill may be filed for the discovery of any property, thing in action, &c., belonging to the debtor, or held in trust for him, made no change as to the rights of creditors against the fraudulent conveyance of property that may be reached by execution. This class of cases stand as they did before the statute. *Lore v. Getsinger*, 191
2. Three creditors had obtained judgments in a Justice's Court against the same defendant; the judgments, with the costs thereon, amounting, together, to \$103; and had issued executions thereon, which were all returned "no goods." *Held*, that they might unite as complainants in a bill to set aside a fraudulent transfer of personal property that might be reached by execution. *Ib.*
3. The bill charged, also, that a certain conveyance by the defendant of real estate was fraudulent; and prayed that that, also, might be set aside. After the bill was filed, one of the creditors obtained a judgment against the defendant in a higher court, which was a lien on lands, (the judgments in the Justice's Court being no lien on lands). An amendment of the bill to introduce the subsequent judgment was not permitted. *Ib.*
4. Facts on which the transfer of personal estate was declared void as against creditors. *Ib.*

Vide CONVEYANCE, VOLUNTARY, 1.
INJUNCTION, 7.

FRAUDS BY INCORPORATED COMPANIES.

1. A judgment which was not entered until after the appointment of a Receiver, under the "Act to prevent Frauds by Incorporated Companies," is not entitled to preference. *Kelly v. Neshanic Mining Co*, 579
2. *Semble*, That a judgment which was not entered until after injunction granted, under the said act is not entitled to preference. *Ib.*

GUARDIAN AND WARD.

1. A guardian's account, prepared by

himself, was presented to the Surrogate on the day the ward came of age, and was by the Surrogate, without being particularly examined by him, (the guardian showing the receipt of the ward, who was present and said he believed the account to be right), reported to the Court and allowed by the Court. By a memorandum at the foot of the account it appeared that commissions, if they had not been paid by the ward, were waived by the guardian. It subsequently appeared that there were mistakes in the account, against the ward; one in the footing of a column, and the other in a miscalculation of interest. On the application of the ward, the Orphans' Court opened the account, on the showing of these mistakes apparent on the face of it, and directed a re-statement of the account, correcting these mistakes; and directed the allowance to the guardian, in the re-stated account, of the amount of the commissions which had thus been, if not paid by the ward, waived by the guardian and directed the allowance of counsel fees to the guardian.

The Ordinary, on appeal, directed both these allowances to be struck out; and directed the Register of the Prerogative Court to re-state the account accordingly. *Runkle v. Gale*, 101

2. A father, without taking out letters of guardianship, acted as the guardian of the estate of his daughter, received moneys expressly in that character, and receipted for them in that character. *Held*, that lapse of time in analogy to the Statute of Limitations was no defense. *Pennington v. Executors of Fowler*, 343

IMBECILITY OF MIND.

Vide EVIDENCE, 1. INCAPACITY, MENTAL, 1, 2.

INFANCY.

1. A sale and conveyance made by persons of full age, of lands which had been conveyed to them while under age, in exchange for lands conveyed by them, was held to be a confirmation of the deed made by them while under age. *William v. Maybee*, 500

INCAPACITY, MENTAL.

1. That the complainant, before the making of the contract, had had a severe attack of illness, from which time he was a less active, enterprising business man than before; that he was a man of intemperate habits; that he was subject to occasional fits, arising from the habits of intoxication; that his mind was less vigorous than when his habits were correct, does not show that he was deprived of his right reason, or incapable of managing his affairs or business. *Doughty v. Doughty*, 643
2. The bill stated, that at the time of the making of the partition sought to be avoided, the complainant was deprived of his right reason, and was of unsound mind, and totally incapable of transacting any business, or of the government of himself and management of his affairs, and stated what the partition was. *Held*, that under this bill the court could not decree for the complainant, and set aside the contract upon evidence of imbecility of mind and the ground that the partition was so unequal as, joined with the incapacity of the complainant, to raise a presumption of fraud in the defendant in procuring the deed of partition. *Ib.*

Vide AGREEMENT, 1, 2, 3. RELEASE, 2.

INCUMBRANCE.

Vide MORTGAGE, 4. COSTS, 1.

INJUNCTION.

1. W. H. was seized of land bordering on the Delaware river, and held and enjoyed a fishery in the said river opposite his said lands, as appurtenant thereto. After his death, intestate, the Orphan's Court of the county in which the lands are situated appointed Commissioners to make partition of his real estate among his heirs at law. The Commissioners, in making partition, separated the lands lying contiguous to the river from the fishery, by lines and fixed monuments, and severed and set off the fishery as a separate share of the estate, the line of separation being the usual high water mark. An injunction which had been granted restraining the owner of the land from building a wall on the said line was dissolved. *Howell v. Robb*, 17
2. If there be a serious question whether machinery in a building is covered by a mortgage, the court will interpose to prevent its re-

moval until the question can be settled. *Hutchinson v. Johnson*, 40

The mortgagor should be made a party in a suit raising such question. *Ib.*

3. The assertion of a right the existence or non-existence of which is properly determinable at law, and the exercise of which will do no injury to the party denying it, is no ground for an injunction. *Doughty v. The Som. and East. R. R. Co.*, 51
4. In a bill for a discovery in aid of a defense at law, an injunction was granted restraining further proceedings in the action at law. The defendant answered the bill, denying its allegation, and making no discovery. The injunction was dissolved. *Grafton v. Brady*, 79
5. On a bill charging Executors with having converted a part of the estate to their own use, and the insolvency of the Executors, and that they are about to sell real estate in a manner forbidden by the will, and the apprehension of the complainant that they will convert the proceeds of such intended sale also to their own use, an injunction was granted restraining such sale. *Schenck v. Ex'rs of Schenck*, 140

6. A. left his residence in New Jersey, and went to the city of New York, on the 4th of June, 1846. On the 10th of June, 1846, a creditor of A. sued out an attachment, by virtue of which A.'s property, real and personal, was attached. In January, 1848, the Auditors under the attachment sold the house where A.'s family resided, and it was bought by B.; and in February following B. brought an ejectment. A.'s wife, or widow if he was dead, filed a bill stating grounds on which she believed he had met a violent death in New York; and claiming dower, and that B. could not dispossess her until he had assigned her dower; and obtained an injunction against the ejectment.

The answer stated facts upon which the defendant submitted that A. had absconded from his creditors, and that there was no sufficient ground on which to find that he was dead, seven years from his departure not having expired. The injunction was dissolved. *Hamilton v. Ross*, 465

7. In February, 1841, E. recovered a judgment against M. F. F., and issued a *Fi. Fa.* which was levied on a farm and a house and lots, as the property of M. F. F. R. R. F., a son of M. F. F., for himself and as guardian of his infant children, filed a bill, stating that the said M.

F. F., in July, 1833, "by deed of bargain and sale, sold and conveyed" to the said R. R. F., his heirs, &c., the said farm; and that in December, 1837, the said M. F. F., "by a deed of bargain and sale, sold and conveyed" to the said infants, their heirs, &c., the said house and lots; both which deeds the bill states were recorded May 25, 1846; and stating facts tending to support the validity of the deeds; and praying an injunction restraining E. from proceeding on his execution. The injunction was allowed. An answer was put in denying the *bona fides* of the deeds, and stating facts tending to show the want thereof, and denying their validity as against the judgment for that reason; and also denying their validity as against the judgment by reason of their not having been recorded within fifteen days.

The Chancellor said that both questions were properly triable at law, on ejectment by the purchaser under the execution, and that the judgment creditor should be permitted to proceed to a sale under his execution. The injunction was dissolved. *Freeman v. Elmendorf*, 495

8. The bill, filed in 1848, stated that in 1819 the complainant's mother, a widow, agreed with complainant, that he might take possession of a tract of land, and make improvements on it; and that, in consideration of his so doing, he might take the rents, issues, and profits thereof during his natural life. That the complainant accordingly took possession of, and has since continued to cultivate the said tract, and to take the rents, issues, and profits thereof, and has built a dwelling house, &c., thereon. That his mother, in 1846, conveyed the said tract to a daughter of the complainant, in fee, for the consideration of natural love and affection. That the said deed was accepted by the daughter with full knowledge of the interest of the complainant, and that it was understood and agreed that it was not to take effect during the life of complainant. The bill prayed that the deed might be corrected, and that the daughter might be restrained by injunction from prosecuting an ejectment. The injunction was allowed. The mother was not made a party.

The answer denied all knowledge or information of any agreement that the complainant was to enjoy the land during his life, or for any other term, and stated that the defendant is informed, and believes that no such agreement was ever made between the complainant's mother and him; and averred that the deed

to the defendant was drawn according to the wishes and desire of complainant's mother. *Held*, that the mother should have been made a party defendant. And that, she not being made a party defendant, the answer was sufficient to dissolve the injunction. *Degroot v. Wright*, 516

9. An injunction was applied for, restraining the defendants from continuing the working of steam engines in a factory near the dwelling house of the complainant and other buildings owned by him and occupied by his tenants, on the grounds that the steam engines, when in operation, shook and injured the said buildings, and that the business carried on in the said factory was a nuisance to the neighborhood. It appeared, by affidavits read in opposition to the motion for an injunction, that the complainant had brought at action at law against the defendants for the same alleged injury, and that the jury had found a verdict for the defendants. Injunction denied. *Durant v. Williamson*, 547

10. On the oath of E. G., a single woman, that R. F. had gotten her with child, and that her child was likely to be born a bastard, and to be chargeable to the township of Warren, in the county of Somerset, a warrant was issued by P. M. and L. M., two of the Justices of the Peace of the said county, for the arrest of R. F., and a summons for the appearance of the said R. F. and E. G. before the said two justices. By virtue of this warrant, a constable of the said county arrested R. F., and took him before G. M., another Justice of the Peace of the said county. R. F. denied the charge and proffered himself ready, with H. S., his friend, to give the requisite security for his appearance at the General Quarter Sessions of the Peace, to abide such order, &c. Instead of taking a recognizance for appearance as aforesaid, the said justice, G. W., prepared a bond to indemnify the township, which R. F., with H. S. as surety, executed, supposing it to be an instrument of surety for appearance, &c., as aforesaid. Afterwards an examination was had before the said P. M. and L. M., Justices, the Overseers of the Poor of the township attending, and the Justices decided against making an order of bastardy against R. F. Afterwards one of the said Overseers informed R. F. that the instrument which he and his said surety had signed as aforesaid, was a bond to indemnify the township; and that the Overseers intended to enforce it. R. F. thereupon went to Justice G. W. to inquire, &c., who informed R. F. that he, the said

Justice, knew it was the intention of R. F. and his said surety to give security for the appearance of R. F. as aforesaid; but that the Constable told him, the said Justice, that he must prepare an indemnifying bond, and he did so; but that, as he had made the mistake, he would make out a recognizance for R. F.'s appearance as aforesaid, and the said Justice made out the recognizance, and sent it to the Court of Quarter Sessions, which court, at the next session thereof, discharged R. F. and his surety therefrom; and afterwards, the said Overseers commenced an action in the Circuit Court of Somerset on the said bond of indemnity.

On a bill stating the foregoing facts, an injunction was allowed restraining further proceedings in the said action.

The bill prayed a decree that the said bond be delivered up to be cancelled. No answer was put in. An order for proofs was made, and subsequently a decree for the complainant. *Field v. Cory*, 574

11. A cedar swamp, of thirty-three acres, was devised by N. F. to his Executors, with directions to sell the same. On Aug. 8, 1836, the Executors made a deed of it to J. E. C., and on the same day J. E. C. made a deed of it to T. J. F., one of the Executors. In Aug., 1843, T. J. F. gave a mortgage on it to J. B. In Oct., 1846, a bill was filed by R. F., against the said Executors to set aside the said deed, and in Jan., 1848, they were decreed to be void; and the decree directed that the cedar swamp be sold by a master; and it was so sold in May, 1848, and E. W. purchased it at that sale. J. B. was not made a party to that suit. In June, 1848, J. B. filed his bill on the mortgage given to him by T. J. F., and in September, 1848, a decree *pro con.* was made for the sale of the mortgaged premises; and they were sold in January, 1849, and was bought by J. B. (leaving a balance due on the mortgage). R. F. and E. W. were not made parties to the said suit of J. B. E. W., after her said purchase at the master's sale, cut a part of the cedar growing in the swamp, and moved it to lands of a third person, where it was struck off at vendue to bidders; and J. B., after his purchase under the said decree on his mortgage, filed a bill against E. W. and said bidders, and obtained an injunction restraining the bidders from taking the wood so struck off to them, and restraining E. W. from further cutting. On the bill and the statements of the answer the injunction was dissolved. *Brown v. Folwell*, 593

Vide BILL OF INTERPLEADER, 2. FRAUDS BY INCORPORATED COMPANIES, 1, 2. JUDGMENT BY CONFESSION, 2. MORTGAGE, 2, 5. PARTNERSHIP, 2, 4. PLEADINGS. PRACTICE, 1. RAILROADS, 2. COURT OF ERRORS AND APPEALS, PRACTICE, 1, 2.

INSOLVENCY.

Vide EXECUTORS AND ADMINISTRATORS, 1.

INTERPLEADER.

Vide PLEADINGS.

JEW.

Vide AFFIDAVIT, 1.

JUDGMENT.

Vide FRAUDS BY INCORPORATED COMPANIES, 1, 2.

JUDGMENT BY CONFESSION.

1. The affidavit required by the Statute to be made by the plaintiff on his taking a judgment by confession on bond and warrant of attorney must show a debt existing at the time of the entry of the judgment. *Blackwell v. Rankin and Lee*, 152
2. A. and B., partners in trade, confessed a judgment to C. The affidavit of C. stated the consideration to be, in part, notes of A. and B. indorsed by C., and not due; in part, notes of other persons given to A. and B. and indorsed by C., and not due; and, in part, notes lent by C. to A. and B. for their accommodation, and not due. Execution was issued on the judgment, and levied on all the property of the partnership. On bill by D., a creditor without judgment of the partnership of A. and B., C. was restrained by injunction from proceeding to a sale under his execution. And, on motion, without answer to dissolve the injunction, the motion was denied. *Id.*

JUDGMENT AND EXECUTION.

Vide LIEN, 1.

JURISDICTION.

1. W. J., of the city of New York, died there, leaving a will, by which, after certain specific legacies and devises, he gave the residue of his property to W. J. T., when he should arrive at the age of twenty-one. The will was proved in New York, and the estate administered there. W. J. T. died before attaining twenty-one, and without issue. The bill claimed, that by the death of W. J. T. the devise and bequest of the said residue to him lapsed, and that the said residue was distributable among the next of kin of the testator.

E. H., who lived and died in New Jersey, was one of the next of kin. H. T., a citizen of New York, visited E. H., in her lifetime, at her residence in New Jersey, and obtained from her an assignment and release to him of all her interest in the said residue. The bill alleged that this assignment was obtained by fraud, and prayed that it might be declared void, and that H. T. might be decreed to account and to pay, &c. On the filing of the bill by the personal representative of the said E. H., a subpoena was issued against H. T., and was returned "not found," with the usual affidavit of non-residence, and that H. T. resided in New York; and an order of publication was made in the usual form, and was duly published, and a copy thereof was served on H. T., in New York. *Held*, that the Court did not thereby acquire jurisdiction of the case. *Hoyt v. Thorn*, 9

2. The issuing of a subpoena against a non-resident and taking an order for his appearance and publishing the order will not give the court jurisdiction, either over his person, or over the subject matter of the bill, if, from the nature of the case, the court has no jurisdiction over either. *Gifford v. Thorn*, 90

3. If the case be such that the court cannot give relief for want of jurisdiction over either the person or the subject matter, the jurisdiction may be objected to in any stage of the proceedings; indeed, the court would take judicial notice of it; it would not make a decree which it had no power to enforce. It is otherwise where the objection to the jurisdiction is that there is a perfect remedy at law; such objection must be taken by demurrer or insisted on in the answer. *Gifford v. Thorn*, 90

4. On a bill filed by the administrator of E. H., deceased, against H. T., a resident of New York, and the executor of J. R., deceased, who was,

in his life time, executor of W. J., deceased, who lived and died in New York, and whose will was proved there, and whose estate was administered there; charging that H. T. came to the residence of E. H., in New Jersey, and fraudulently procured from her an assignment to him of her share of the estate of W. J., deceased, and that J. R., who lived and died in New Jersey, knew the circumstances under which that assignment was obtained, but, nevertheless, paid to H. T., in virtue of the said assignment, the share of E. H. in the said estate, and took a bond and mortgage from H. T. to save him harmless; and praying, that the said assignment may be ordered to be cancelled, and that H. T. and the executor of J. R. may be ordered to account, and to pay to the complainant the share of E. H. in the said estate; a subpoena was served on the executor of J. R. deceased, and a subpoena was issued directed to H. T., which was returned "not found," and the usual order for publication was made as to H. T. The court refused to vacate this order. *Id.*

LAND.

1. An act of the Legislature of N. J., under the present constitution, cannot authorize a railroad company to take land for the construction of their road without first making compensation therefor to the owner. *Doughty v. the Som. & East. R. R. Co.*, 51

Vide RAILROADS, 1, 2.

LAPSE OF TIME.

1. The lapse of twelve years before the bill was filed to set aside deeds procured from one who was incompetent from imbecility of mind to make them was held not to be, under the circumstances of the case, sufficient to establish the deeds. *Doughty v. Doughty*, 227

2. Under what circumstances the lapse of twelve years will be a ground on which a Court of Equity may refuse to interfere to set aside a partition deed alleged to have been obtained by the defendant from the complainant when he was of unsound mind. *Doughty v. Doughty*, 643

Vide GUARDIAN AND WARD, 1.

LEASE

Vide RECEIVER, 5.

LEGACY.

1. Testator directed the executor of his will to pay the interest of a bond and mortgage he held against P. A. to his wife, for her life, and then to J., his son, for his life, and then to pay the principal to J's children. It was held to be a specific legacy. *Executor of Baldwin v. Baldwin*, 211
2. A request to the trustees of the Bethel Church in Newark is a good bequest to a church the corporate name of which is "The Bethel Church in Newark." *Ib.*

LIEN.

1. A deed of land was made to A. and B. in November, 1822, which was recorded in March, 1823. A. conveyed an undivided half of it to C., by deed dated Feb. 5, 1827, which was recorded Feb. 20, 1827. C. conveyed his undivided half to D., by deed dated April 27, 1833, which was not recorded until August 5, 1845. On the 23d May, 1840, deeds of partition were made between B. and D., which were both recorded on the same 23d of May, 1840. D. conveyed the half which had been set off to him in the partition to E., by deed dated March 14, 1842, which was recorded May 7, 1842; E. conveyed this half to F., by deed dated May 6, 1842, which was recorded May 7, 1842; and on the same day F. gave to E. a mortgage on this half, to secure a part of the purchase money, and also made a lease of it to E. until the first of April thereafter. F. died; and in April, 1843, the administrator of his estate, by order of the Orphans' Court, sold the half to G. and executed a deed to him, which was recorded Feb. 20, 1844. G. conveyed this half to H., by deed dated December 8, 1844, and recorded Nov. 7, 1845. In July, 1844, I. recovered a judgment against C.; and, shortly after, caused an execution to be issued on the judgment and levied on this half, and claimed that, inasmuch as the deed from C. to D. was not recorded at the time of the recovery of his judgment, the half thus held by H. was subject to the judgment and execution, by force of the statute of New Jersey, Rev. Stat. 642, sec. 18. *Held*, that the same facts which would charge a purchaser from C. at the time of

the entry of the judgment with constructive notice, would prevent the judgment's becoming a lien on the land thus held by H. That the said statute does not require actual notice; but that constructive notice is sufficient. *Lewis v. Hall*, 107

2. The quasi lien of the creditors of a partnership on its property, as against creditors of individual members of the partnership, gives equity jurisdiction for the purpose of protecting the members of the partnership. *Blackwell v. Rankin and Lee*, 152

LIEN (PRIORITY OF).

Vide MORTGAGE, 4.

MACHINERY.

Vide INJUNCTION, 2. FIXTURES, 1.

MISTAKE.

1. If a mortgage is, by mistake as between mortgagor and mortgagee, so drawn as to exclude land which they intended it should include, and the mortgage is recorded as drawn, and the lands not included in it are sold to a *bona fide* purchaser without notice of the mistake; or lands as well those included as those not included in the mortgage but intended to be, are sold together with other lands not intended to be included in the mortgage, subject to such mortgage on a part of them, to a *bona fide* purchaser without notice of a mistake, the mistake will not be corrected as against such purchaser. *Rutgers v. Kingsland*, 178,
2. A subsequent purchaser from such *bona fide* purchaser without notice will hold the land not included in the mortgage free from the mortgage, although such subsequent purchaser knew of the mistake; because, by purchasing from him who bought in good faith without notice, he would acquire all his rights and equities. *Ib.*
3. A subsequent purchaser, *bona fide* and without notice, from a first purchaser who had notice of the mistake will hold the land not included in the mortgage free from the mortgage; because his equity would be at least equal to that of the mortgagee. *Ib.*

VIDE GUARDIAN AND WARD, 1. SALE
BY SHERIFF, 3. CONVEYANCE,
VOLUNTARY, 1. INJUNCTION, 9.

MORTGAGE.

1. A. executed a deed of land to B., absolute on its face; and B. executed to A. a bond, in a penal sum, reciting the deed made by A. to him, and that A. was indebted to him on two notes, stating them, and the amounts thereof, and providing that if A. should refuse or neglect to pay the said notes on or before a certain day, the bond should be void; but that if A. should, on or before the said day, pay the said notes, and the said B. should, upon due notice of such payment, thereafter neglect or refuse to convey the said land to A., the said bond should remain in force. *Held*, that the deed and bond constituted a mortgage. *Van Wagnen v. Van Wagnen*, 27

Held, further, that the mortgage was not a security for moneys due from A. to B. on other accounts. *Ib.*

2. On a bill filed by A. against B. and others on a mortgage, the Master reported, that there was due to the complainant on his mortgage, on the 1st August, 1842, \$16,021.51, and that the further sum of \$7,459.17 would be due to the complainant on his mortgage on the 16th October, 1842; and that there was due to B., one of the defendants, for interest on his mortgage, on the 23d April, 1842, \$1,096.50, and that the further sum of \$543.25 would become payable for interest on B.'s mortgage on the 23d October, 1842, and the like sum for interest every half year, until June 7, 1855, when the principal of B.'s mortgage would become due; and that a competent part of the premises could not be sold to pay what had become due to the complainant and B.; and therefore a decree was made for the sale of the premises, in parts; the proceeds of the first part to be applied to pay, first, the principal and interest due and to become due to the complainant on his mortgage, with his costs, and, if any should remain of these proceeds, then, secondly, the principal and interest due and to become due to B., with his costs; and if the proceeds of the first part be insufficient to satisfy the complainant's mortgage, his costs, and the costs of B., then that another part be sold; and if the proceeds of that should not be sufficient to pay the complainant and his costs and B.'s costs, then that another part be sold, &c. On the petition of C., who, after the

filing of the bill, became part owner of the mortgage premises, stating that, since the issuing of the execution, he had paid a large part of the complainant's mortgage, and had paid to B. all the interest that was due and payable and \$600 of the principal though not due and payable; that the complainant had directed the Master to stay the sale under the execution; but that B. insists to the Master that the sale must proceed; and that the Master threatens to proceed at the instance of B. *Held*, that B. had no control of the execution. And the Master was ordered not to proceed without instructions from the complainant or the further order of the court. *State Bank at Morris v. Bell*, 373

3. A. gave to B. a bond conditioned for the payment of \$2,000; and on the same day executed to B. a writing purporting to be a mortgage to secure the payment of the said bond, referring to the bond; but no sum was stated in the said writing purporting to be a mortgage, the blank in which the sum should have been stated not being filled up. The execution of this writing was acknowledged before a proper officer; and there was a certificate of the Clerk of the County indorsed thereon stating that it was recorded May 10, 1841. The registry of the mortgage, also, was blank as to the sum. Afterwards, there was attached to the page on which the registry was made a writing, dated June 28, 1841, signed by A., stating that the sum of \$2,000 was omitted being inserted in the mortgage, and that the said sum should have been so inserted; and desiring that the mortgage might not lose its effect by the omission. In 1844, A. gave a mortgage on the same lands to C., who, previous to taking his mortgage, had examined the records of mortgages and found the record as above stated. C.'s mortgage was taken to secure an old debt from A. *Semhle*, that the said writing executed to B. would be held to be a mortgage, and to have priority over the mortgage to C. *Lambert v. Hall*, 410

4. A. gave to B. a bond and a mortgage to secure the payment thereof; and subsequently gave a mortgage to C. on the same land. Afterwards, D., an uncle of A., paid, or handed to B. two several sums of money at two different times, taking loose receipts therefor on account of the said bond held by B., and afterwards a further sum as the balance in full on the said bond; and, when the last of said sums was so paid or handed to B., the three sums were credited on the bond, the two first on account of the

bond, and the last as the balance in full on the said bond; and D. took no assignment of the said bond and mortgage given to B., or of either of them. *Held*, under the proofs in the case, that the said bond and mortgage, in the hands of D., were not encumbrances as against the mortgage held by C. *Ib.*

5. T. gave two mortgages, one to M. and the other to R. of a tract of land of 18 acres; and afterwards conveyed to A. half of the tract, and thereupon A. gave to T. an obligation that he would pay, as part of the purchase money for the nine acres, the said two mortgages to M. and R. A. afterwards gave to B. a bond, and, to secure it, a mortgage on the nine acres he had bought of T., as additional security for moneys for which B. held A.'s mortgage on other lands. T. afterwards conveyed the residue of the tract to C., with full covenants of warranty, and at the same time assigned to C. the said obligation of A. to pay the two mortgages held by M. and R. M. filed a bill for the foreclosure of his mortgage, making R. a party defendant. B. was not made a defendant, he not having got his mortgage from A. when the bill was filed. A decree was obtained in that suit for the sale of the whole tract, to satisfy the mortgages of M. and R.; and a *fi. fa.* for sale was issued to the Sheriff. B. then filed his bill, stating, that the half remaining in T. after he had sold half to A. was sufficient to pay the mortgages to M. and R., and submitting that the half so remaining in T., and which was afterwards conveyed by T. to C., should be first sold; and prayed an injunction staying proceedings on the *fi. fa.* which had been issued. The injunction was allowed.

On answer and motion to dissolve the injunction, it was held that, as between C. and A., the half so conveyed to A. ought to be first sold, to pay the mortgages held by M. and R.; and that the equity was the same between C. and B., the mortgagee from A. *Held*, that A. was not a competent witness to prove payment of his said obligation to T., though B. had released him from personal liability on his said bond to B. and agreed to rely only on the said mortgage given by A. to B. *Held*, that T., on being released by C. from his covenants in his deed to C., was a competent witness to prove that B. had notice, before he took his mortgage from A., that A. had given his obligation to T. to pay the mortgages held by M. and R. *Black v. Morse*,

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6. A bill by a subsequent mortgagee against the mortgagor and prior mortgagees neither admitted nor denied the prior mortgages; and its prayer was, that the mortgagor be decreed to pay the complainant's mortgage, or that, in default thereof, the mortgagor and prior mortgagees be barred and foreclosed from all equity of redemption; and that the mortgaged premises be sold, and that out of the proceeds the complainant might be paid the amount of his mortgage; and for such other and further relief, &c. A demurrer filed by the prior mortgagee was allowed. *Gihon v. Belleville White Lead Co.*, 531

7. A bill by a subsequent mortgagee, making a prior mortgagee a party, may pray a sale of the interest mortgaged to him a sale subject to the incumbrance of the prior mortgage; or, that he may be permitted to redeem the prior mortgage and have the premises sold to pay such redemption money and his own mortgage; or, that the mortgaged premises may, if the prior mortgagee consent thereto, be sold, and that out of the proceeds the mortgages may be paid according to priority. *Ib.*

8. A prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, though he is made a defendant in the bill. *Ib.*

9. If, upon a bill by a subsequent mortgagee as usually drawn here, the prior mortgagee takes such a course, either by answer, or by putting in his mortgage before the Master, as shows his consent, the mortgaged premises will be ordered to be sold, and the mortgages directed to be paid according to priority. *Ib.*

10. A mortgage was executed in blank, the sum which it was designed to secure not appearing either upon the mortgage or the registry; but the proviso thereof stated that it was to be void on the payment of (blank) agreeably to the condition of a bond given by the mortgagor to the mortgagee, of even date with the mortgage, and payable at a day specified. The bond contained the sum. *Held*, that the mortgage was good against a subsequent mortgagee. *Ec'rs of Hall v. Lambert*, 651

11. A. gave to B. a bond and mortgage to secure the payment thereof; and subsequently gave to C. a mortgage on the same land. Afterwards D., an uncle of A., paid or handed to B., two several sums of money at two different times, taking loose receipts therefor on account of the said bond held by B.,

and afterwards a further sum as the balance in full on the said bond; and when the last of said sums was so paid or handed to B., the three sums were credited on the bond, the first two on account of the bond, and the last as the balance in full on the said bond; and D. took no assignment of the said bond and mortgage given to B., or of either of them. *Held*, under the proofs in the case, that the said bond and mortgage in the hands of D. were subsisting incumbrances as against the mortgage held by C. *Ib.*

Vide INJUNCTION, 2. FIXTURES, 1. AGREEMENT, 4.

NON COMPOS.

Vide AGREEMENT, 1, 2, 3. RELEASE, 2.

NON RESIDENT.

Vide JURISDICTION, 1, 2, 3, 4.

NOTICE, CONSTRUCTIVE.

1. N. was a bona fide purchaser for a valuable consideration from M., by deed dated May 6, 1842, recorded May 7, 1842. M. was then in the actual possession and occupancy of the premises thus conveyed by him, a considerable portion of it being cleared, and he cultivating it as a farm. M. had received a deed for the premises on the 14th March, 1842, which was recorded May 7, 1842. In May, 1840, partition, by deeds, of a tract of land including the premises in dispute was made between S. and M.'s grantor, by which the premises in dispute had been set off, by metes and bounds, to M.'s grantor. These deeds of partition were recorded May 23, 1840. The testimony showed that the parts thus conveyed, by metes and bounds, by these deeds of partition, had been by agreement occupied separately, before these deeds of partition were made, according to the boundaries of the separate parts given by those deeds; and that S. and M.'s grantor had possessed, and occupied, and exercised the usual acts of possession and ownership, notoriously, from from April 27, 1833, on which last mentioned day C. had conveyed an undivided half of the whole tract to M.'s grantor. This deed from C. to M.'s grantor was not recorded until August 5, 1845. *Held*, that these facts would charge a purchaser from C. in July, 1844, with constructive notice. *Lewis v. Hall*, 107

Vide LIEN, 1. CONVEYANCE, VOLUNTARY, 1. REGISTRY.

NUISANCE.

Vide INJUNCTION, 9.

OATH.

Vide AFFIDAVIT, 1.

ORDER OF PUBLICATION.

Vide JURISDICTION, 1.

ORPHANS' COURT.

Vide GUARDIAN AND WARD, 1. EXECUTORS AND ADMINISTRATORS, 3, 4, 5, 6.

PARTIES.

1. By agreement under seal, B. agreed to sell to A. a tract of land which, the agreement said, B. had bought of C., and for which D., by agreement between him and C., was to make a deed to C., and B. undertook to procure and make title to A. D. afterwards made a deed for the land to E. A. filed a bill against E. alone, praying that his title might be established and for possession and an account of rents and profits. *Held*, that the representatives of D., who was dead, were necessary parties. *Haythorn v. Margaree*, 324
2. If, upon the true construction of an agreement set out in the bill, subscribers to it who are not made defendants should have been made defendants, the defect of parties may be taken advantage of by demurrer, though the complainant in his bill has put a construction on the agreement which would make it unnecessary to make such subscribers defendants. *Black v. Shreeve*, 440

Vide INJUNCTION, 2, 8. JURISDICTION, 4. AGREEMENT, 4.

PARTNERSHIP.

1. A person employed by another in a manufacturing establishment at a

salary of \$500 a year and one-fourth of the profits is not a partner. *Nutting v. Colt*, 539

2. A. employed B. in a manufacturing establishment at an annual salary of \$500 and one-fourth of the profits, and B. agreed that A. might use his name as a partner in the business if A. should deem it advisable. The name of A. & Company was assumed. Afterwards, A. being about to create a lien on property in the establishment, B. gave a written certificate in which he stated that he, "one of the firm of A. and Company," did not possess any interest in the property used by the Company, and did not claim any right in or to the same on account of his being a partner of the Company or on any other account. A. thereupon gave a mortgage on property in the establishment to secure acceptances of drafts to be drawn in the name of A. and Company. B. afterwards filed a bill against A. stating that he was a partner, and charging that A. had received large sums and applied them to his own use, and kept no proper accounts thereof, and refused to account to the complainant; and prayed an injunction, and the appointment of a Receiver. The injunction was allowed. On answer, the appointment of a Receiver was denied, and the injunction was dissolved. *Ib.*

3. To a bill by one of two partners against the other for an account, the bill saying nothing of any settlement having ever been made between them, the answer set up a settlement up to a certain time, and gave an account since the settlement; and the complainant's solicitor took an order of reference to state the accounts. *Held*, that the Master could not disregard the settlement. *Parkhurst Muir*, 555

4. The exclusion of one partner by the other from participation in the business of the partnership is a ground for injunction, restraining the excluding partner from collecting debts due the partnership, and for the appointment of a receiver. *Wolbert v. Harris*, 605

5. As a general rule, the court will not order the business of a partnership to be continued by the receiver. *Ib.*

Vide LIEN, 2. JUDGMENT BY CONFESSION, 2. RECEIVER, 4.

PAYMENT.

1. As a general rule, the taking of a note from a mortgagor or judgment

debtor for interest due on the mortgage or judgment is not a payment of the interest if the note be not paid. *Corrigan v. Trenton Del. Falls Co.*, 489

Vide MORTGAGE, 4.

PETITION.

Vide MORTGAGE, 2. RECEIVER, 5.

PLEADINGS.

BILL FOR DISCOVERY.

Vide INJUNCTION, 4. DISCOVERY, 1.

* BILL OF INTERPLEADER.

1. On a bill of interpleader the first decree is that the defendants interplead, and the case then becomes a case between the defendants as between a complainant and defendant. *Rowe v. Adm'rs of Hoagland*, 131

2. A. gave a bond to B. B. died leaving a will and appointing executors thereof. On the death of B., C. took possession of the bond, claiming that B., in her lifetime, had by parol transferred it to her, the said C., and notified the obligors not to pay the bond to the said Executors, and that it was her property, and in her possession, and that she should sue the obligors. The executors gave notice to the obligors not to pay the bond to C., and that they should sue if it was not paid to them, and afterwards commenced an action at law against the obligors, and declared upon the bond as a lost bond. The obligors filed a bill against the executors and C., praying that they should interplead, and praying an injunction restraining them from proceeding at law. The injunction was allowed. *Ib.*

3. The answer admitted the facts on which the prayer for interpleader was founded, the answer of C. setting forth the grounds of her claim to the bond. No decree was taken against the defendants to interplead; but the proofs on both sides as between the defendants were taken, and the cause brought to hearing; and it being ready for a decision, both as between the de-

defendants and as between them and the complainants, it was heard and a final decree made. *Ib.*

The court said that C. held the affirmative, and was entitled to the opening and reply. *Ib.*

BILL OF REVIVOR.

M. conveyed land to C., and C. gave a defeazance providing for reconveyance to M. on his paying, &c. M. filed a bill to redeem; and after answer and replication and some proofs in the case, died. G. filed a bill, stating the proceedings on M.'s bill; and that M., in his life time, conveyed all his interest in the premises to him, G.; and that administration of the personal estate of M. had been granted to him, G.; and praying that the said suit of M. might stand revived, &c.; without saying in what character G. sought to revive. C. pleaded that H. was the true administrator of the personal estate of M., and not G. Plea sustained. *Grant v. Chambers*, 223.

What kind of a bill should G. file, as assignee of M. after M.'s bill was filed, in order to get the benefit of the proceedings in the suit brought by M., if such benefit could be obtained in the case?

Semble, that it should be an original bill in the nature of a bill of revivor and supplemental bill. *Ib.*

ANSWER.

1. If a bill state, either directly or by inference, a base line of a fishery, an answer denying that such is the base line and stating another, and showing by what authority that was fixed, is responsive. *Howell v. Robb*. See No. 2, under this head on page 686. 17

DEMURRER.

1. A demurrer can only be founded on a fact or omission appearing in the bill; it cannot set up a fact or omission not appearing in the bill and thereupon demur. *Black v. Shreeve*, 440

POSSESSION.

1. A party in possession may go into a Court of Equity under proper circumstances to remove a cloud from his title. But, it seems, that

a party out of possession cannot, as against another in possession and claiming title under a deed, obtain a decree declaring the defendant's title void, and putting the complainant in possession. *Haythorn v. Margerem*, 324

Vide REMEDY AT LAW, 1. PARTIES, 1.

PRACTICE.

1. On a notice of a motion to dissolve an injunction given before answer filed, an answer filed after the notice, though it be filed ten days before the day fixed by the notice for the hearing of the motion, cannot be read in support of the motion. *Cattel v. Nelson*, 122

Vide PARTNERSHIP, 9. JURISDICTION, 1. COURT OF ERRORS AND APPEALS, PRACTICE, 1, 2.

PREFERENCE.

Vide FRAUDS BY INCORPORATED COMPANIES, 1, 2.

PREROGATIVE COURT.

Vide GUARDIAN AND WARD, 1. EXECUTORS AND ADMINISTRATORS, 3.

PRESUMPTION OF DEATH.

Vide INJUNCTION, 6.

PRINCIPAL AND AGENT.

1. If an agent for the performance of certain services for which a salary or yearly sum is to be allowed him neglects to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal, in which considerable amounts of money previously received by him, are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omission occurred should be disallowed. *Ridgeway v. Ludlam*, 123

PROBATE.

Vide WILL, 1.

PURCHASER WITHOUT NOTICE.

Vide MISTAKE, 1, 2, 3.

PUBLICATION (ORDER OF).

Vide JURISDICTION, 1.

RAILROADS.

1. The act incorporating "The Somerville and Easton Rail Road Company" does not authorize the taking of land without first making compensation therefor. *Doughty v. The Som. & East. R. R. Co.*, 51
2. *Semble*. That under this act the Company cannot apply for commissioners of valuation and damages until the route of the whole road be located. But the Chancellor refused an injunction to restrain the Company from applying for commissioners to value a part located, though the whole route was not located. *Ib.*

RECEIVER.

1. It had been determined that, by an agreement between creditors of an incorporated manufacturing company and the company, a manufacturing establishment was held by A., in trust, first, for the payment of the creditors, and then for the company. The property was occupied by B., in its appropriate use, in connection with, or with the consent of A.; and an order had been made in a cause in which the company was complainant, and A. and B., were defendants, directing both A. and B. to account for the rents and profits, for the purpose of ascertaining whether they had not amounted to sufficient to pay the debts; and the account had not yet been taken, B.'s ability to respond was admitted; and the property was of a nature to be injured if not used. In this state of things, the company applied for a receiver to take charge of the property. The motion was denied. *Hamburg Man. Co. v. Edsall*, 298
2. A denial that property is held in trust does not make the appointment of a receiver necessary on the establishment of a trust. *Ib.*

3. Where there is no ground for apprehension of loss by permitting the property to remain, in its appropriate use, in the occupancy of him who has the use of it, and his ability to respond for its use is admitted, and he is one of the persons who have been ordered, in the cause, to account before a Master for the rents and profits that may have been received, a receiver will not be appointed to take charge of the property. *Ib.*

4. In 1839, A., being the owner of a mill site, sold half of it to B., and A. and B. agreed to erect a factory thereon, and to carry on a manufacturing business in partnership. No written articles of partnership were made; nor was any time fixed for the duration of the partnership. A. and B. mortgaged the property to raise money to put up the building required, and about \$3,000 remained due on the mortgage at the time of the filing of the bill. B. had given A. a mortgage on the half he purchased, for \$400 of the purchase money; all of which remained due at the filing of the bill. In October, 1848, B. filed a bill, charging that A. excluded him from taking any part in the business, and refused to give him any information as to his sales and collections, and had sold goods of the partnership in his own name, and applied the proceeds to his own use, and refused to dissolve and come to a settlement; and that on a just settlement a considerable balance would be due him, B.; and prayed a dissolution and account, and a Receiver. The bill did not charge that A. was unable to respond.

The answer denied the exclusion: stated that, in March preceding the filing of the bill, the parties had a settlement, by which the complainant acknowledged himself indebted to the defendant in \$609.92, beyond the said mortgage debt of \$400, and gave his note therefor to the defendant, no part of which had been paid; and that it was thereupon agreed by complainant that defendant should collect from the partnership business sufficient to pay the said note; that he, accordingly, after said settlement, sold goods of the partnership, (stating particularly what goods), and charged himself with them on the books of the partnership; and that the complainant's share of the net profits of the partnership since said settlement (giving the receipts and payments of the partnership since that time) was not sufficient to pay the said note; and denied that he ever refused to come to a settlement, and stated that he has been at all times, and is ready to ac-

2unt; and denied any design to act unfairly. A motion for a Receiver was denied. *Parkhurst v. Muir*, 307

1. "The Trenton Delaware Falls Company," on the 2d of April, 1833, made two mortgages to the Trenton Bank, for money; borrowed one for \$4,000, and the other for \$6,700; and on the 22d May, 1834, the Bank recovered a judgment against the Company for \$6,000, other money loaned by the Bank. On the 1st October, 1835, there was due to the Bank for interest on the said mortgages and judgment \$2,084.75. On that day the Company proposed to the Bank that if the Bank would make them a further loan, sufficient to pay said arrears of interest and a principal sum due to S. C., the Company would assign to the Bank, as security for the same, the rents reserved on certain perpetual leases of water made by the Company. The Bank accepted the proposition, and the Company made their note to the Bank for the \$2,084.75, payable three days after date, for the said interest, and the Bank loaned to the Company the further sum of \$3,504, and took the note of the Company therefor, payable three days after date, with which sum the Company paid to S. C. the said principal sum due him; and the Company executed to the Bank an assignment (so called by the parties,) of three perpetual leases of water power made by the Company to certain individuals at certain stipulated rents to be paid by the lessees to the Company. The Company afterwards became insolvent; and Receivers were appointed; and in Feb. 1844, by virtue of a decree of the Court and an act of the Legislature, the Receivers sold the property and chartered rights and privileges of the Company free and clear of all incumbrances. The Bank afterwards transferred the said leases to the petitioners, and all rents due and to grow due thereon, and assigned them the said note of \$2,084.75. *Held, first*, that the rent accruing on the said leases subsequent to the sale by the Receivers belonged to the purchaser at the Receivers' sale; that the so called assignment of leases by the Company, the lessors, was a mere authority from the Company to the Bank to receive the rents, which ceased on the appointment of Receivers; and that it created no incumbrance on the property of the Company in the hands of the Receivers. *Second*, that the rents accruing due after the appointment of the Receivers belonged to the Receivers, for the benefit of the creditors of the Company. *Third*, that the rents which had become due before the appoint-

ment of the Receivers might be considered as appropriated to the purpose for which the Company authorized the Bank to receive them, though they remained unpaid by the lessees. *Corrigan v. Trenton Del. Falls Co.*, 489

Vide COSTS, 1. SALE BY RECEIVER, 1, 2. PARTNERSHIP, 2, 4, 5.

REDEMPTION.

Vide EQUITY OF REDEMPTION.

REGISTRY, OF DEEDS, &c.

1. The registry of a mortgage is notice only of what is contained in the registry, and an erroneous mortgage duly registered cannot be reformed as against a judgment creditor without notice. *Ex'rs of Rutgers v. Kingsland*, 178

Vide LIEN, 1. MISTAKE, 1, 2, 3. CONVEYANCE, VOLUNTARY, 1. MORTGAGE, 3, 10. INJUNCTION, 7.

RELEASE.

1. To a bill by a daughter, against the Executors of her father's will, for her share of the residue of the personal estate by the will to be divided among the children, the Executors set up a release executed by her and her husband of all their interest in the estate for \$700. No inventory of the personal estate had been made by the Executors, and the shares afterwards proved to be \$4,500 each. *Held*, that the release was no bar. *Pennington v. Ex'rs of Fowler*, 343

2. Bill by one of the next of kin, against the administrator of an intestate and the other next of kin for a distributive share of the personal estate. The defendants set up a release executed by the complainant of all her share of the estate. The release was declared void under the proof made of the want of mental capacity in the complainant to make a valid release. *Rickey v. Davis*, 873

Vide MORTGAGE, 5.

REMEDY AT LAW.

1. In 1814, by agreement under seal,

- A. contracted to buy, and B. to sell to A. a tract of land; and B. bound himself to give a deed to A. for it. A. paid the purchase money, and went into possession, and occupied it until 1825, when he moved from the vicinity, and, subsequently, C. took possession of the land. *Held*, that the fact that A. had not obtained a deed from B. was not a sufficient ground for applying to a Court of Equity to give him possession as against an intruder; that his remedy was by ejectment. *Haythorn v. Margerem*, 324
2. Bill retained and time given to bring ejectment. *Tomlinson v. Sheppard*, 810

Vide INJUNCTION, 7, 9.

RENT.

Vide RECEIVER, 5.

REPRESENTATION.

Vide DEVISE, 3.

SALE.

Vide AGREEMENT, 4. RECEIVER, 5. TRUST, 1. MORTGAGE, 5. COSTS, 1. SALE BY SHERIFF, 1, 2, 3. SALE BY RECEIVER, 1, 2.

SALE BY SHERIFF.

1. At Sheriff's sale on execution *Caveat emptor* is the rule. *Mervin v. Vanlier*, 34
2. The sheriff at the sale said he was selling the right and title of the mortgagor, and the crier of the sale advised a friend of his, who asked his advice privately, to have nothing to do with the property; that whoever bought it would probably buy a lawsuit. The property, for which the complainant had agreed to pay \$2,800, was sold for \$1,400. It had been a neighborhood talk that the title of the mortgagor was disputed, and the complainant had himself contributed to becloud the title. There was no allegation in the bill that the title was free from dispute, nor that any better offer had been made for the property. The court refused to set aside the sale. *Ib.*

3. On a foreclosure bill, a general decree for the sale of all the mortgaged premises had been taken, and a *fi. fa.* for sale issued thereon, and the sheriff had struck off the whole property at one bidding, for \$15,000. Before a deed was given by the sheriff, the defendant in the decree and execution filed a bill, stating that the property was worth \$60,000, and consisted of distinct tracts; and also that a mistake had been made in the newspaper advertisement, by which the descriptions of the different tracts were erroneously given; and praying an order directing the sheriff not to deliver the deed. The order was granted, and the sale was subsequently set aside, and an order made that the property be sold in parcels, if the defendant in the decree and execution so requested. *Ryerson v. Boorman*, 167

SALE BY RECEIVER.

1. *Seemle*, that the Receiver, under the "Act to prevent Frauds by Incorporated Companies," should sell the property, irrespective of the incumbrances, and pay the incumbrances according to their priority, out of the proceeds. But that the court may direct the Receiver to sell subject to the incumbrances. *Kelly v. The Neshanic Mining Co.*, 579
2. As to the question whether the Receiver should sell the engine, mining tools and implements with the mine lands or separately, the court left it to the discretion of the Receiver, to be determined by inquiries to be made by him as to the probability of finding ore by continuing the works, no ore having yet been found. *Ib.*

SCIRE FACIAS.

Vide EXECUTION, 1.

SETTLEMENT OF ACCOUNTS.

Vide PARTNERSHIP, 9.

SHERIFF'S SALE.

Vide SALE BY SHERIFF.

TRESPASS.

Vide INJUNCTION, 11.

TRUST.

1. Bill filed July 11, 1843, stating that J. S. died in March, 1812, having devised a tract of land to P. S. in trust for the daughter of J. S., a married woman, and her children, free from the control of her husband. The daughter died, leaving six children. On the 4th November, 1819, the daughter and her husband and the children made a deed of the land to G. M., some of the children being under age, and P. S., the trustee, subscribed a writing under seal at the foot of the deed in the words following; "I do hereby agree to the above conveyance in manner and form therein set forth." The consideration of this deed was a deed from G. M. for certain lands in Ohio. The bill stated that P. S. had removed from the State, and prayed that a trustee be appointed in his stead, to carry the trust into effect. It appeared that after the minor children came of age they joined in a sale and conveyance of the land in Ohio. The Court refused to appoint a new trustee. *Williams v. Mabee*, 500

Vide RECEIVER, 1, 2. CONVEYANCE, VOLUNTARY, 1.

TRUSTEE.

Vide TRUST.

WILL.

1. J. L., a resident of New York, died there insolvent in July, 1841, leaving a writing purporting to be a will, but which was refused probate as such (under a statute of New York, which provides that the cancelling of a subsequent will shall not revive a prior one which had been retained uncanceled) on the ground that the said writing had been revoked by a subsequent will; which subsequent will had been cancelled. Administration of the estate of J. L. was granted in New York to J. L. L., who was named in the said writing as one of the executors thereof. There being lands in New Jersey which the decedent in his life time owned, a creditor of the decedent, residing in New Jersey,

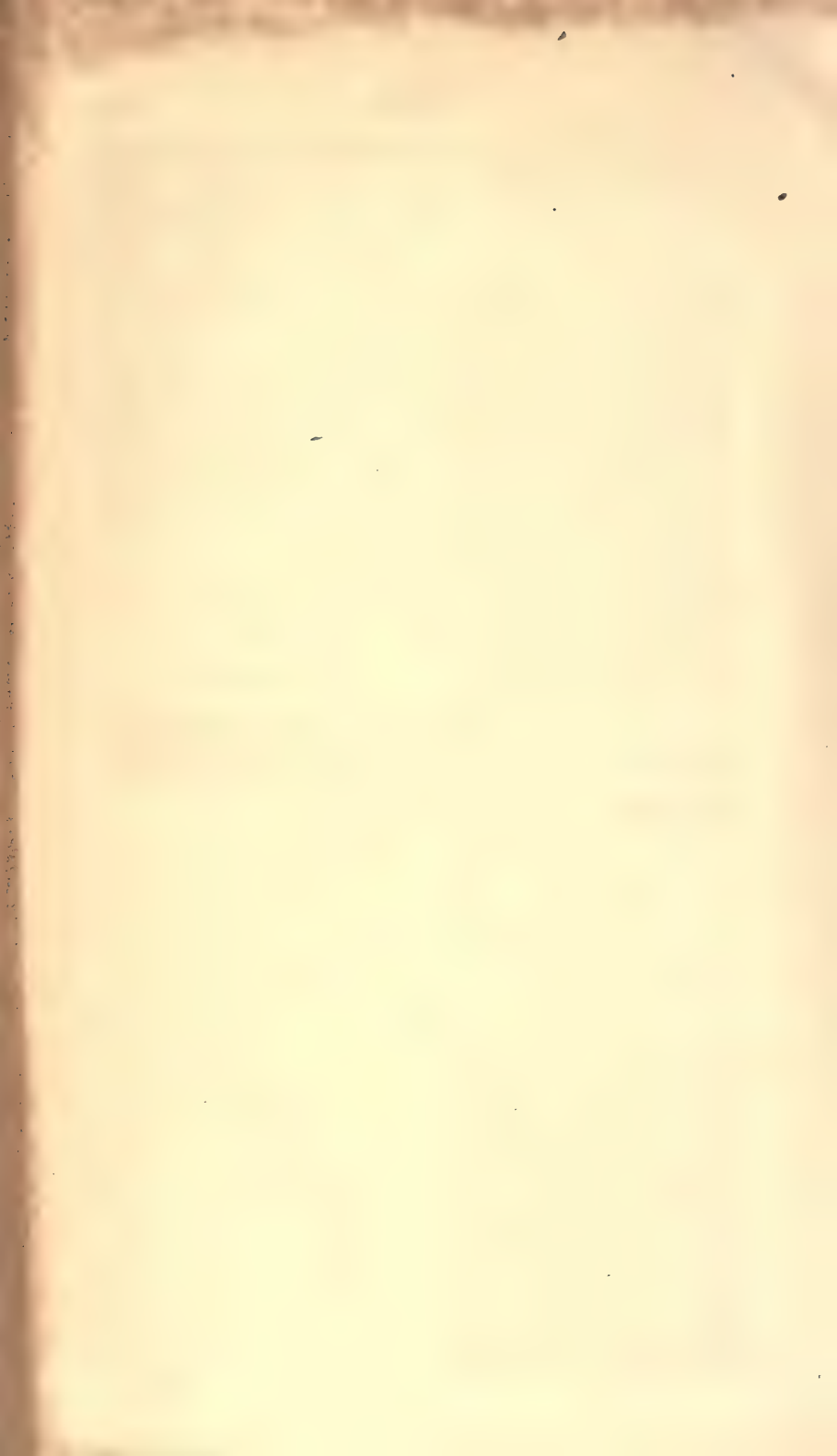
obtained letters of administration in this State, and obtained an order for the sale of the said lands. W. B. L., with the approbation of J. L. L., obtained an act of the Legislature of New York, authorizing the Surrogate of the City of New York to deliver said writing to him. W. B. L. obtained the said writing from the Surrogate of New York, and it was admitted to probate in New Jersey, by the Ordinary, on the 7th of April, 1848. On the petition of J. A. P., a person interested in the estate, presented to the Ordinary April 18, 1848, the probate was vacated on the ground that the notice of application for probate, required by statute, had not been given. The question of the validity of the writing as a will, in New Jersey, was not decided. *Will of Isaac Lawrence*, 215

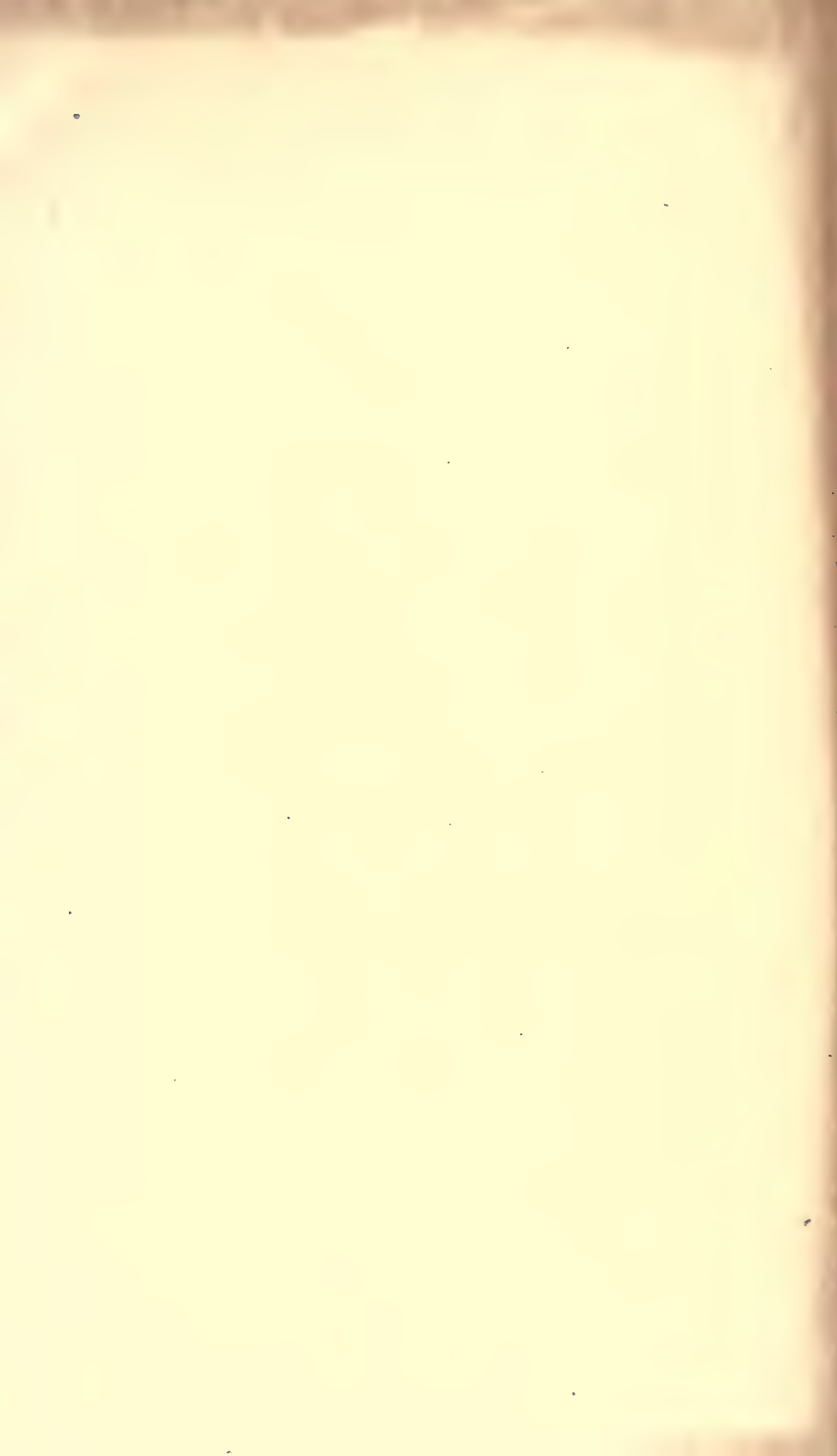
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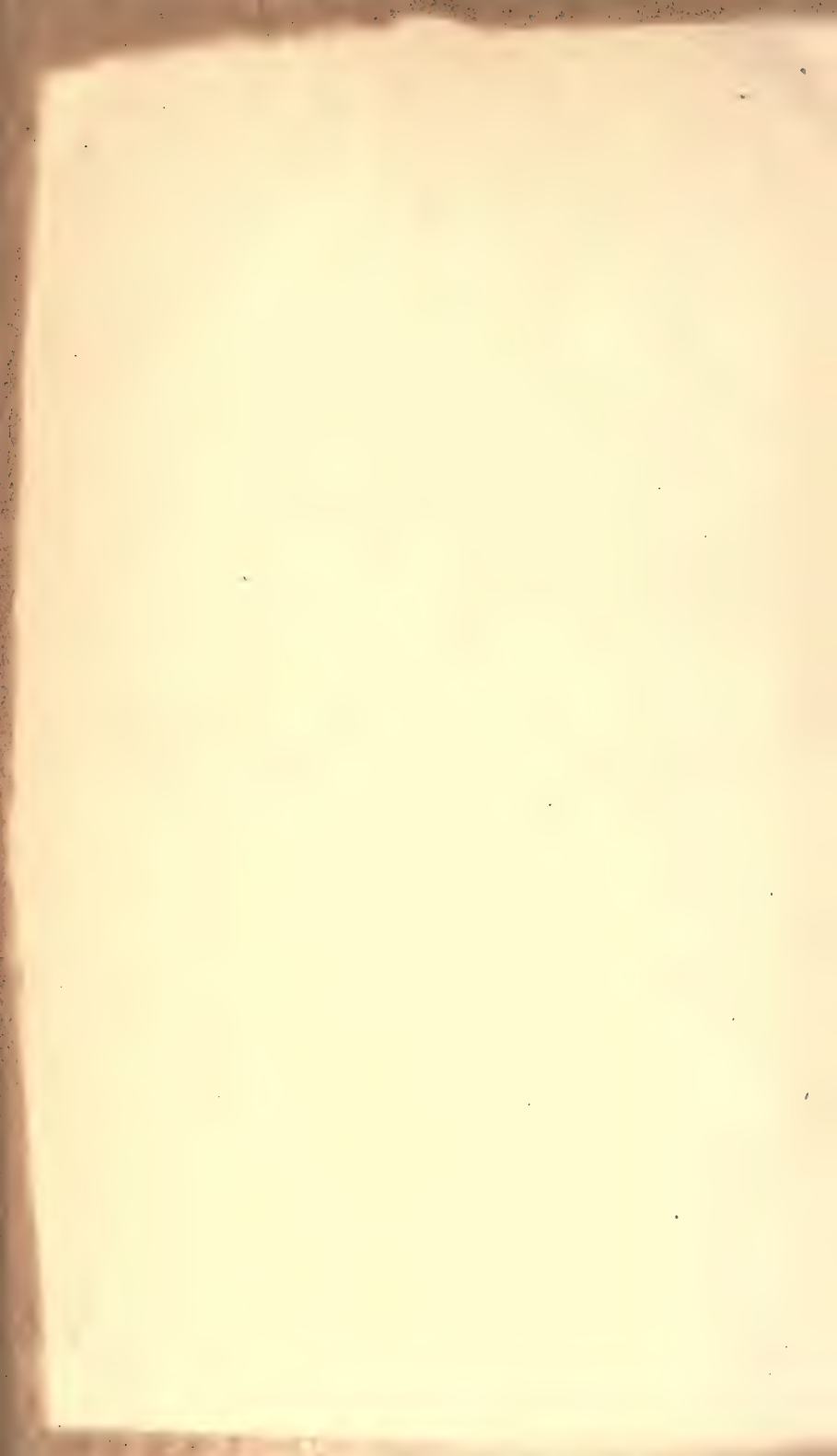
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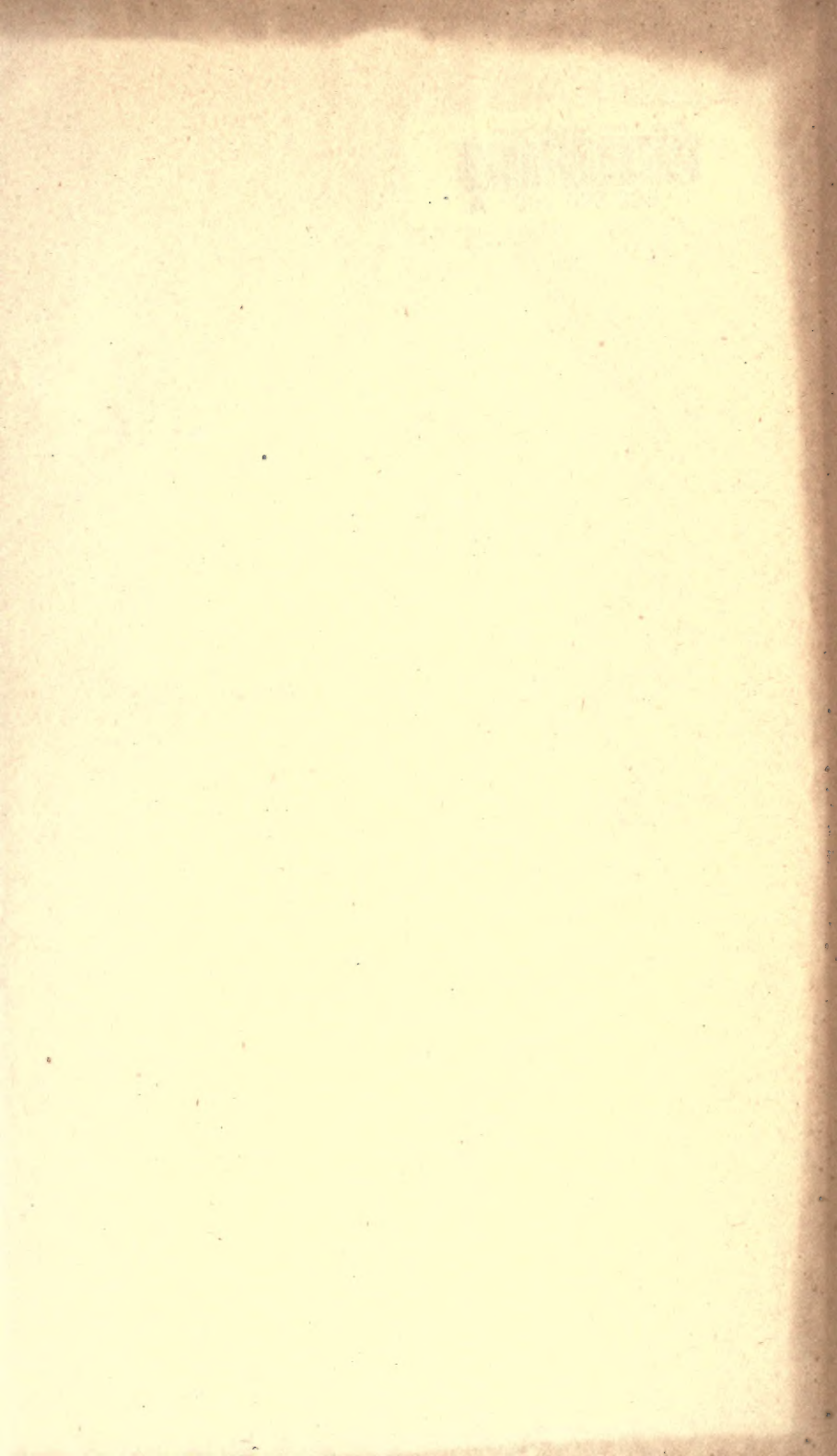
Vide MORTGAGE, 5.

1. A commission for the examination *de bene esse* of a non-resident infirm witness may be awarded before issue joined. *Leonard v. Sutphen*, 545.











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